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CONVEYANCER'S NOTEBOOK

REPORT OF H.M. LAND REGISTRY FOR 1960-61

The Land Registry comes in for a good deal of criticism but we sometimes have the feeling that this criticism is more in the nature of an excuse for inefficiency elsewhere. The fault for delay does not always originate in the registry. The Chief Land Registrar, in his report for 1960–61, mentions that his hope in making a greater reduction in the time for completing all classes of registrations was frustrated by the extra work caused by the large number of applications which were not in order when lodged. Nevertheless, the average time taken for first registrations in compulsory areas was reduced to under 28 days for the first time since 1953 and our impression is that of late there has been an appreciable speeding up in all transactions. The most noticeable point in the report is the phenominal increase in the number of voluntary first registrations from just over 6,000 in 1959 to just over 9,000 in 1960, representing 13·5 per cent. of the total first registrations, a remarkable tribute of the feelings of the customers.

The substantial increase in the number of searches of the index maps shows that the profession is becoming more aware of the facilities offered by the registry. The report also notes the growing tendency to dispose of houses on building estates by granting long leases rather than by outright sales. (We wish the Chief Land Registrar would tell us the ratio of absolute leasehold to good leasehold titles.) The cost per transaction has gone up from 32s. to 33s., against the pre-war cost of 17s. 3d., but the registry are still showing a reasonable profit. The report is cheaper again this year at 1s.

The Housing Land Crisis

The Chief Land Registrar in his report mentioned that the price of many building estates on the outskirts of provincial towns has often exceeded £5,000 per acre in 1960. The anxiety caused by the high price of building land has been voiced in several quarters. The Alliance Building Society have issued a report under the above title examining the position of building land for housing and the rate of construction related to the needs of the country. This report is objective and non-political and does not suggest any particular remedy. It appears to have been produced with the entirely altruistic purpose of collecting and setting forth the facts. The primary conclusion is that the rate of construction must be almost doubled from an annual average of 205,000 to 400,000. If anyone doubts the gravity of the situation, the article on " Homeless Families in London " in *The Times* of October 27 will come as a shock. The position in London is getting steadily worse.

The Times mentioned that " A suggestion has been made that more use could be made of the 2,000 unused sites that are owned by the L.C.C. and which have been lying idle, many of them since the war." The conclusion seems inevitable that there is far too much politics in housing today. There is a scramble for land in which private builders and local authorities join; but so often when the local authority manages to acquire some land it already has so much to do that it has to keep the land a long time until it is able to build while the private builder has to scramble for some other land. Sometimes when he succeeds in the scramble, the local authority makes a compulsory purchase order and the Minister orders a local inquiry with the result that the land may be sterile for more than a year. Is it reasonable that there are 2,000 unused sites in the hands of the London County Council while the number of homeless steadily grows?

That the price of building land is still rising and that the competition for the land available is becoming more intense are indisputable. There are few who would advocate a return to the pre-1947 Planning Act position: planning is undoubtedly here to stay and a good deal of the detailed planning is excellent, but the conclusion of the Alliance Building Society's report, echoing the demands of many in the building industry, is that substantial allocations of land for residential developments must be made immediately. As conveyancers it is almost immaterial to us what happens, for the flow of work appears to be unceasing, but as citizens we are concerned to seek to prevent homelessness. Taking proceedings to evict a worthy citizen because of a demolition order is unpleasant

and the apparent indifference of the various authorities to the situation of the tenant does not lessen this feeling.

Trustee Investments Act, 1961

A correspondent writes that he cannot quite follow Mr. Alec Samuels' illustration at p. 373, *ante*, where he says that, if a trustee sells 400 of the 500 rights shares which accrued to him from his holding in the wider range part of the trust to enable him to take up the balance of 100 shares, these 100 shares should rank as an accrual to the fund which has to be divided between both parts. The correspondent suggests that the position is governed by section 2 (3) (*a*), rather than 2 (3) (*b*) as Mr. Samuels suggests.

Mr. Samuels replies:

" I disagree with this suggestion. It is quite clear that a rights issue is to be treated as an investment and not an accrual. The matter was fully discussed at the House of Commons Standing Committee B Trustee Investment Bill (Lords) Eighth sitting Tuesday, April 25, 1961, cols. 369–375. I think I cannot do better than quote from the words of Mr. A. Barber: ' section 2 (3) (*a*) deals with accrual by reason of the exercise of any right arising from property already owned by the trustee at the material time. On the other hand, the rights issue of shares, an issue offered to existing shareholders on payment, is essentially an investment and as such falls to be treated like any other investment, not as an accrual within section 2 (3) (*a*) ' (cols. 369–370). Later he says: ' . . . . it is true that in the case of a rights issue there is, as it were, normally a bonus element, but I do not think . . . one should try to hive off the bonus element so that part of the rights issue is treated as an accrual and part as a fresh investment ' (cols. 370–371). Later on he says: ' It was never intended that section 2 (3) (*a*) should cover the case of a rights issue. . . . It is not a right of the shareholder *qua* shareholder; it follows upon an offer made by the company to the shareholder. Therefore, both in fact and in law, it is more in the nature of a fresh investment rather than an accrual. In those circumstances, if one has to decide whether it is in law most appropriate to be treated as an accrual or as a fresh investment, I should have thought it should be treated as a fresh investment. Whether, as a matter of common sense or practice, it should be treated as one or the other is to some extent a matter of opinion, but on common sense grounds most investors would have looked upon the purchase of a rights issue as being in the nature of an investment rather than an accrual ' (col. 371).

" Now I think it is plain from these extracts that a rights issue is

to be treated as an offer made by the company to the shareholder trustee, and if that offer is sold for value the resulting cash is to be treated as an outside addition to the fund, to be divided, or placed to one part balanced by a compensating transfer to the other part, in the normal way. If this cash is not placed to the fund but used for taking up some of the shares, then those shares similarly must be treated as an outside addition to the fund to be apportioned in the normal way. If, however, the offer or part of it is not sold but taken up, and the purchase price is found from the wider-range part, either because the money is available or because some wider-range investments were sold for this purpose, then the shares purchased under the rights issue belong entirely to the wider-range part as they were purchased from the resources of the wider-range part."

Escrows and Leases

At p. 89, *ante*, we said: " It is perhaps unnecessary to point out that in the ordinary case of a lease not preceded by any contract actual exchange still appears to be necessary." When challenged on this we defended ourselves at p. 257, mentioning that J. G. M. in the *British Tax Review* [1961] at p. 7 supported us. Alas, J. G. M. tells us that we misread him. He points out that *Phillips* v. *Edwards* [1] was merely a claim for specific performance of a contract, whereas in *Beesly's* case [2] there was an amendment and the plaintiff claimed that the lease had been executed and the lessors were bound by it. Quite true, but are we to assume that *Hollington Bros. Ltd.* v. *Rhodes* [3] was decided merely on the technical ground that the lessee had not framed his action the right way?

H.M. Land Registry Notice

The following notice has been issued by the Land Registry:

" 1. Further to relieve congestion in H.M. Land Registry, Lincoln's Inn Fields, the registers, filed plans and index maps relating to the County of Oxford are being removed to Tunbridge Wells, Kent, on November 1, 1961, where as from that date the registration of title work in this area will be done.

" 2. The Tunbridge Wells sub-office is already dealing with the work from the County Boroughs of Bristol (City), Hastings, Eastbourne and Oxford (City) and the Counties of Berkshire, Cornwall, Devon, Dorset, Hampshire, Kent, Somerset, Sussex and Wiltshire and it would be a great convenience if applications for registration,

[1] (1864) 33 Beav. 440.
[2] [1961] 2 W.L.R. 36.
[3] [1951] 2 T.L.R. 691.

searches, etc., affecting titles in these areas and in the area mentioned in paragraph 1 above could be sent there direct.

" 3. Personal searches of the registers and index maps may be made at Tunbridge Wells but where it is desired to inspect these records in London they will be made available at Lincoln's Inn Fields at short notice.

" 4. The address of the Tunbridge Wells sub-office is:

H.M. Land Registry,
Tunbridge Wells,
Kent.
Telephone No.: Tunbridge Wells 2780/91."

THE TRUSTS OF INSURANCE POLICIES UNDER SECTION 11 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882

By Peter Elman, m.a., Barrister-at-Law

It will be recalled that section 11 of the Married Women's Property Act, 1882,[1] provides that a policy of assurance effected by a man on his own life for the benefit of his wife and/or children or any of them shall create a trust in favour of the objects named therein, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the insured's estate or be subject to his debts except where intent to defraud is involved. The insured may by the policy or by any memorandum under his hand appoint a trustee or trustees of the insurance moneys and from time to time appoint a new trustee or new trustees thereof and may make provision for such appointment and for the investment of the policy moneys. The section also contains a number of subordinate provisions to meet the case where no trustee has been appointed by the insured person or there is otherwise no trustee available.[2]

The purpose of the section is clearly to enable a trust to be created, appropriating policy moneys to and for the benefit of the wife and/or children of the insured, without the necessity of executing a formal deed [3] and probably incurring heavy costs and stamp duty, and yet at the same time obtaining all such savings of tax and death duties as may in the circumstances be available.[4]

This article is not concerned with the financial advantages of such insurance policies as fall within the section but with the problem of securing that the intentions of the husband will be effective when framing such policies and, as we shall see, other documents ancillary thereto.

A preliminary question which requires consideration is the kind of policy to which the section applies. The section speaks of a

[1] The amendments of the Act by the Law Reform (Married Women and Tortfeasors) Act, 1935, are not relevant to the present purpose.

[2] A woman may likewise effect a policy for the benefit of her husband and/or her children. For the sake of convenience only, I here treat the husband as the insured and the wife, etc., as the beneficiaries. Children will include legally adopted children: Children Act, 1958, s. 22.

[3] *Cf. Cousins* v. *Sun Life Assurance Society* [1933] Ch. 126, 133.

[4] See (1954) 18 *Conveyancer*, 15.

policy of assurance effected upon a man's life. Is this confined to a whole-life policy [5] or does it comprehend the very common life-endowment policy [6] and even also an accident policy? [7] An endowment policy taken out by a husband maturing on his death or on the expiration of twenty years whichever first occurs and payable to his wife upon his earlier death was held to be partly within and partly outside the section depending upon the maturing event. If the policy becomes payable by reason of the death of the insured, then the section applies and the wife gets the benefit of the policy. So far as it is expressed to be for the benefit of the wife in the event that has happened, the policy creates a valid and effectual trust under the section.[8] An accident policy is also within the section since the phrase " a policy of assurance," it has been held, is not to be restricted to natural as opposed to accidental death or to death from any particular cause, subject always to the terms of the particular policy.[9]

Most if not all insurance companies have standard forms of policy which expressly incorporate references to the section in some such words as follows: " This policy is effected under the Married Women's Property Act, 1882, and the trustee or trustees for the time being hereof shall hold this policy and the moneys assured hereunder in trust for. . . ."

It does not, however, appear essential for the validity of the policy and the benefits taken thereunder, so far as concerns the section, for any express reference to the Act or the section to be contained therein. In many of the decisions on the section, the policies involved did not mention the Act or the section and no point was taken on this omission. For instance, in one case [10] the husband and wife took out a joint policy payable to the survivor of them, the names of the grantees appearing by reference to them as " Grantees " in the Schedule of Particulars under " To whom payable." Vaughan Williams L.J. very briefly doubted whether the husband (who was the survivor) was thus sufficiently named so as to bring the trust in his favour within the section. Kennedy L.J., however, was certain that the reference sufficiently named the husband, and the wife's insurance took effect under the section. " I fail to understand," he

5 A whole-life policy is one under which the policy money is payable on the death of a particular person.

6 A life-endowment policy is one under which the policy money is payable at a specified date or the earlier death of the insured.

7 An accident policy is one under which the policy money (which may vary in the event) is payable upon the insured sustaining any specified injury.

8 *Re Ioakimides' Policy Trusts* [1925] Ch. 403.

9 *Re Gladitz* [1937] Ch. 588.

10 *Griffiths* v. *Fleming* [1909] 1 K.B. 805 (C.A.), which is authority for the proposition that a husband has an insurable interest in the life of his wife without proof of any pecuniary interest.

said, " why this is not expressed to be the husband. . . . The distinction between express and implied trusts is well settled, and the Act is simply excluding implied trusts. No one could argue that a trust declared . . . by deed or will for the survivor of husband and wife is an implied and not an express trust. The inclusion of children in the Act shows that this is the intention of the Act, for a class of future children cannot be named, and the usual form of trust for children in a marriage settlement is for such as attain twenty-one, or marry under that age." [11]

In another case,[12] the policy simply contained the following clause: " It is understood and agreed that all claims under this policy shall be payable to . . . wife of the assured, if she is living at the happening of the event upon which the claim becomes payable, or if she is dead then to the executors, administrators or assigns of the assured." Although it was strongly submitted that these words were insufficient to bring the policy within the section as being " expressed to be for the benefit of his wife," the court had no difficulty in holding that the policy was governed by the section and the wife took the benefit.

Two words of warning must, however, be added. First, apart from the section, no trust is created. If, for instance, an endowment policy is taken by a father in his own name payable to a child of his, not upon the father's death (which would bring the section into operation), but upon such child attaining a given age and the father dies before the date of maturity, the child does not acquire any legal estate in the policy and she cannot sue on it or claim the money.[13] The fact that the policy moneys are made payable to someone other than the insured person does not make the latter a trustee of such moneys.

Secondly, a policy effected under the section must be distinguished from an assignment of an existing policy to trustees for the benefit of wife and children. The distinction is most important, perhaps, with regard to the incidence of estate duty in respect of the premiums paid by the insured person after the date of the assignment.[14]

We may draw this general conclusion from the reported cases. No express mention of the Act or the section is required to validate the policy for the purposes of the section and any words which in

[11] *Ibid.*, 818, 819.
[12] *Re Gladitz*, *supra*.
[13] *Re Engelbach's Estate* [1924] 2 Ch. 348. See also *Bown* v. *Bown* [1949] P. 91, where the wife was the beneficiary and it was provided that if she predeceased the husband the policy should vest in the latter.
[14] See, *e.g.*, *Re Hodge's Policy* [1957] 3 All E.R. 584.

substance are not distinguishable from " the benefit of his wife and/or children " are a sufficient expression of the intention of the insured to effect the policy under the Act.[15]

In addition, there seems to be no difference whether the policy contains a provision simply that it is issued for the benefit of the designated beneficiary, with or without the addition of an express direction or covenant to pay the policy money to the beneficiary. If the plain meaning is that the policy is for the benefit of the designated person, such express direction or covenant adds nothing and detracts nothing.[16]

The next important question is whether the reference in the policy must be exhaustive of the trusts declared or whether, given the general expression of intention, more detailed and varied directions as to the terms of the settlement, *e.g.*, the interests the beneficiaries are to take, may be contained in a document outside and not necessarily contemporaneous with the policy itself.

It is to be observed that the section itself, in providing in the manner that it does for the appointment of trustees and the investment of policy moneys, contemplates the execution of " outside " documents. But are such " outside " documents restricted to the two matters mentioned in the section? The provision for the appointment of trustees in this manner clearly envisages the possibility of a continuing trust and that provision merely enables the insurance company to obtain a valid receipt and discharge for the policy moneys without having to see to the execution of the trust.[17]

The section also contemplates that the interest taken by the wife and children may not be concurrent [18] and whether they are concurrent or not must depend upon the terms of the intended settlement, which may or may not be expressed in the policy.

In this regard, it is instructive to note the difference in wording between section 10 of the Married Women's Property Act, 1870, which corresponds with section 11 of the 1882 Act and was repealed by the later Act.[19] In section 10 of the 1870 Act the wording was " shall be deemed to be a trust for the benefit of . . . *according to the interest so expressed.*" The omission of the italicised words in section 11 of the 1882 Act must mean that " the interest " need not be expressed in terms in the policy.

Even under section 10 of the 1870 Act, it has been held that, where the trust was for the benefit of the wife and children as the

15 See *Re Fleetwood's Policy* [1926] Ch. 48.
16 *Cousins* v. *Sun Life Assurance Society*, *supra*, at p. 135.
17 *Re Seyton* (1887) 34 Ch.D. 511, 516. This case was decided on the corresponding section in the Married Women's Property Act, 1870, s. 10, whereunder the power of appointment of trustees lay with the court.
18 *Ibid.*, 516, 517, specially referring to s. 11 of the 1882 Act.
19 s. 22.

husband should appoint, but no appointment was in fact made, the wife and children took between them equally.[20] This, if anything, shows that the declaration of the precise interests which the beneficiaries are to take contained in an " outside " non-contemporaneous document would be effective.

Any such " outside " document is in principle indistinguishable from and, it is submitted, as valid and effective for the purposes of the section as the document appointing trustees or providing for the investment of the policy moneys, which is expressly within the section. There exists however, we apprehend, one difference between the two documents. Whereas the latter, being provided for in the section, need not be mentioned but may always be implied in the policy, the former probably requires express mention in the following or like form: " in such shares and for such interest and generally in such manner as the assured shall by any will or codicil thereto or by deed revocable or irrevocable or otherwise appoint and in default of such appointment . . ." [21]

An allied question is whether the objects of the trusts created by the policy must be specifically designated by name. It is apparent from what has already been said that this requirement is not essential. On general grounds there is no reason why it should be so. In the " ordinary " marriage or child settlement, children or issue can in fact, by the nature of things, never be named and as long as the objects are indicated with some precision the trusts are effective in their favour. It is true that the section speaks of " a trust in favour of the objects therein named." The word " named " has, it seems, never been considered as being confined to its literal meaning but always in the wider connotation of " designated." [22]

A general designation of the wife of the insured person may, however, by operation of law result ultimately in a situation which does not reflect the true intentions of the insured. Consequently, careful attention must be paid to this aspect of the matter.

As has been said, in common parlance and on grounds of common sense, when a man speaks of his wife he means the wife he has

[20] *Re Edwards* (1879) 41 L.T. 434.

[21] See, *e.g.*, *Re Parker's Policies* [1906] 1 Ch. 527. The power of appointment, etc., which is reserved should clearly not amount to a retention by the settlor of such control over the policy moneys as to deprive the settlement of the available saving in regard to tax and estate duty. In *Gunner* v. *Gunner & Stirling* [1949] P. 77, which concerned the variation in divorce proceedings, as post-nuptial settlement, of a policy under the section, Wallington J. said (at p. 90): " There may be many variations in the terms of the policy although it is issued taking advantage of the express trust to which it becomes subject when it is issued in pursuance of the provisions of that section. . . . *There may be other accompanying documents, or there may be evidence of oral declarations* . . . to show the intention of the parties." (My italics.)

[22] *Re Browne's Policy* [1903] 1 Ch. 188.

at the time of speaking and does not contemplate one he may marry thereafter. In the case of an insurance policy which is expressly intended to make provision for the wife upon the husband's death, the considerations of common sense lose most of their force, and the probability is that the husband meant to provide for the wife who actually survives him although a previous divorced wife might have some claim.[23] In the simple case, where a man merely leaves his widow, no great problem may arise. But where there are also surviving children, both of a first wife and of the widow, the position may be somewhat different. If the policy was effected " for the benefit of his wife and children," and the insured dies leaving a widow, who is his second wife, and children both by her and his previous wife, it seems that the widow and all the children take equally.[24] It would, indeed, work an absurdity if, as is generally conceded, all surviving children are entitled, to exclude the wife. But would it not be equally absurd, if the first wife had not died but had been divorced to exclude her? A different kind of complication would arise if the policy had been effected during the lifetime of the second wife. Could it be then conceded that all surviving children, including those by the first wife, are entitled? It might on common sense grounds be arguable that only the children of the widow are within the trusts of the policy. Again, what would be the position if the policy were " for the benefit of his wife and her [*or* their] children "? Surely, that would exclude the children of the widow, as well as the widow herself. The various permutations and combinations are almost inexhaustible and the most peculiar results may follow. Thus, if the policy is " for the benefit of his wife and if she be dead between his children," the widow who is a second wife would not take notwithstanding that her children participated in the policy moneys.[25]

It is clear that particular care must be taken in designating the objects of the trust if the insured's purpose is not to be stultified and probably the surest way in which to provide that the intentions and purposes of the insured person are truly effective is not to rely exclusively upon the designation in the policy but to employ the " outside " document already referred to.

Such a course also affords the opportunity to regulate in detail the contingencies upon which the interests of the objects arise and the nature of those interests. In a simple case of a policy " for the benefit of his wife " and the wife predeceases the husband who then

23 Matrimonial Causes (Property and Maintenance) Act, 1958, and consider *Gunner* v. *Gunner & Stirling*, *supra*.
24 *Re Browne's Policy*, *supra*.
25 *Re Griffith's Policy* [1903] 1 Ch. 739. See also *Re Seyton*, *supra*.

dies without having remarried and leaving a widow, there is a resulting trust in the husband.[26]

The resulting trust can be avoided and other ultimate objects designated. These other objects need not, it is submitted, fall within the " statutory " class to which the section applies, without affecting the validity of the policy. The ratio of the decision which brings an endowment policy within the section applies in this regard [27] and so far as in the event that has occurred the " statutory " class takes, the policy is effective under the section. It follows that the interest of the " statutory " class or of any member thereof can be of a limited or contingent character without preventing the policy from being a benefit within the section.[28]

Apart from the directions in the policy itself or the " outside document " the interests of the objects are prima facie joint and they take in equal shares.

Thus, if the policy is for an unnamed wife and children, all those who survive take as joint tenants between them, the wife, on the one hand, and the children, on the other hand, not being regarded as two separate classes, each to share in the policy moneys equally.[29] But the slightest circumstances may be seized upon without affecting the policy, as a sufficient indication that the wife was intended to take as a class by herself as against the children as a class or even that she takes only a life interest with remainder to the children.[30] It is apparent, therefore, that the policy can validly give the benefit to all the surviving objects as joint tenants, or give one of them a life interest with remainder to the others at such times and in such manner or otherwise as the insured person may desire, as he could in the " ordinary " settlement.

One may go even further. The presence of a provision in the policy, and by the same token in the " outside " document, enabling the insured person to exercise a power against the interests of any one or more of the beneficiaries thereunder does not mean that the policy will be construed as giving him the right to defeat and destroy such interests. So, if the beneficiary's interest is contingent upon his or her surviving the insured person and the latter has the power in certain events to receive the cash value of the policy, the policy will not be invalidated under the section, and in the event of such power being exercised, the benefit thereof will

[26] *Re Collier* [1930] 2 Ch. 37.
[27] *Re Ioakimides' Policy Trusts*, *supra*.
[28] *Re Fleetwood's Policy* [1926] Ch. 48.
[29] *Re Davies' Policy Trusts* [1892] 1 Ch. 90.
[30] *Re Seyton*, *supra*, at p. 514. In this case the policy was for a named wife and unnamed children and they took as joint tenants equally among them. If the policy admits of two constructions, one within and one outside the section, the former will prevail.

enure to the benefit of and must be retained for the purposes of the trust. If, in this event, the beneficiary is still alive, the policy moneys must be retained and accumulated on trust until it is ascertained by the death of either party who becomes entitled.[31]

In a converse situation, subject always to the terms of the trust, the insured person will be protected in regard to any premiums he pays to keep the policy alive after the death in his lifetime of the beneficiary and the latter or her estate will still be entitled to a partial benefit. This can be exemplified in the following manner. The policy is expressed to be for the benefit of the insured's wife under the Act. The wife predeceases the husband before the policy has any surrender value. The husband continues to pay the premiums until maturity whilst the proceeds of the policy are held in trust for the wife's estate. The husband is entitled to be indemnified for moneys advanced by him to the extent of the premiums to preserve the trust property.[32]

There is one other matter which needs to be considered in the drafting of a policy under the section. By its terms the trust normally constitutes a vested interest in favour of the wife,[33] and it would seem that subject to the terms of the policy a post-nuptial settlement is created which in the event of the divorce of the parties may be varied under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.[34] The ratio appears to lie in the fact of the incomplete nature of the transaction by reason of the periodical payments made and to be made by the husband. The provision being clearly made for the wife in her character as wife, and not in any other character, and out of the husband's desire to provide for her when she becomes a widow, it is plain that, unless the husband goes on paying the premiums—although under no contractual obligation so to do—it would be impossible to achieve the purpose he must have had in mind when he effected the policy. Again, it must be remembered that if he continues to pay the premiums, he will be continuing to provide for a woman who is no longer his wife.[35]

In conclusion, one must advert to the contrast in the phrasing of the section between " in favour of the *objects* named " and " so long as any *object* of the trust remains unperformed." In section 10 of the 1870 Act, the first phrase does not appear and in the second

31 *Re Fleetwood's Policy*, *supra*.
32 *Re Smith's Estate* [1937] Ch. 636.
33 *Cousins* v. *Sun Life Assurance Society*, *supra*, where the policy was issued for the benefit of a named wife.
34 *Gunner* v. *Gunner & Stirling*, *supra*, where the policy was for " the benefit and separate use of the assured's wife (naming her) absolutely."
35 *Ibid.* See also *Bosworthick* v. *Bosworthick* [1927] P. 64, which was the case of a single premium policy " to my wife if she survives me."

phrase " unperformed " is omitted. Under the 1870 Act the word " object " can only be applied to the beneficiaries. In the 1882 Act, however, it is difficult to apply the latter phrase unless it relates to impersonal objects, that is, not to the beneficiaries (= objects) but to the purposes of the trust. The effect is that under this Act even if the beneficiary, for whose benefit the policy is expressed to be, predeceases the insured person, the object of the trust so remains unperformed and the trust in favour of the beneficiary does not cease by reason of such death but remains to be fulfilled on the maturity of the policy. It may be difficult to visualise circumstances where the whole object of the trust has ceased. A partial ceasing may frequently arise, as in the case of a trust primarily, say, for the education of a child, and secondarily for some other object within the section and the primary trust for one reason or another fails. The only case which one can find where the performance of the whole object of the trust came to an end is the very individual one where the wife murdered her husband. On the grounds of public policy, the wife rendered the trust incapable of performance and it was held that an object that cannot be performed cannot, for the purposes of the section, be said to remain unperformed.[36]

[36] *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, 154.

SHORT REVIEW OF THE MATRIMONIAL CAUSES ACT, 1950, s. 24, ORDERING A SETTLEMENT OF THE GUILTY WIFE'S PROPERTY

By Alec Samuels, Barrister-at-Law

Matrimonial Causes Act, 1950, s. 24 (1)

" If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

Guilty Wife

The section is limited to the three matrimonial offences indicated.

Property Available for Settlement

The property settled must be in possession or reversion. It is open to the court to order the sale of the wife's jewellery and the settlement of the proceeds, but it is unlikely to take that course. Reversionary property includes life policies [1] and property to which the wife is absolutely entitled subject to prior life interests.[2] Contingent interests are not available for settlement.[3] Thus property which may come to the wife as an object of a discretionary trust or as an object of a power of appointment which has not yet been exercised in her favour cannot be settled. Any protected life interest enjoyed by the wife would automatically be forfeited upon any settlement being ordered.

By the Matrimonial Proceedings (Property and Maintenance) Act, 1958, ss. 2 and 5, where proceedings for financial relief are brought against the wife by her husband or former husband, he may apply for an order to set aside dispositions of her property during the preceding three years with the intention of defeating his claim. Unless a disposition is made for valuable consideration to a person who acted in good faith and without notice of any such intention, it

1 *Stedall* v. *Stedall* (1902) 86 L.T. 124.
2 *Bacon* v. *Bacon and Bacon* (1860) 2 S. & T. 86.
3 *Stone* v. *Stone* (1864) 10 L.T. 140.

is presumed, unless the contrary is proved, to have been made by the wife with the intention of defeating the husband's claim for financial relief.

Death of Parties before Settlement

Presumably the husband's personal representatives cannot apply for a settlement to be made, although the death of the husband will not prejudice the right of the guardians of the children of the marriage, or the children themselves if they are adult, from applying.

Suppose the wife dies after the decree but before any application has been made for a settlement of her property? The husband is unlikely to benefit under any will made by the wife, and following a divorce he is ex hypothesi not a surviving spouse. But by the Matrimonial Proceedings (Property and Maintenance) Act, 1958, ss. 3 and 5, the court may now order provision to be made for a former husband in appropriate circumstances out of his deceased former wife's estate, and such order may include a settlement of the property of the former guilty deceased wife's property: s. 5 (3), proviso (*b*). The children of the marriage are much more likely to benefit under any will made by the wife, and will benefit under her intestacy. They may also apply for reasonable provision under the Inheritance (Family Provision) Act, 1938.

Property Abroad

Property situated abroad is not suitable for being settled under section 24 since the court has no effective control over the property; and it is doubtful whether the court could or should settle income received in England from property abroad. *In Style* v. *Style and Keiller* [4] Singleton L.J. said: " It is common ground that there are difficulties in securing an annual sum on the income to which the woman is entitled in Texas, and which may, or may not, be received in this country. An order such as that, even if it could be enforced, as to which I have some doubt, would add to the costs of everyone, would mean continuous enquiries, and would not be to the advantage of either party. The fact remains that the wife has a very considerable income in Texas. She has both income and assets. In the circumstances, I feel that it is right that if this court is to make an order under the terms of section 24 (1), the amount ought to be secured on the free investments which she has in this country."

[4] [1954] P. 209 (C.A.).

Wife Domiciled and Resident Abroad

In *Hunter* v. *Hunter and Waddington* [5] Scarman J. held that, where the wife is neither domiciled nor resident in England, the court may nevertheless exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court. But where a wife acquired a foreign domicile and residence and had no property in England the court refused to make an order in respect of her property situated abroad because such an order would infringe the authority of foreign tribunals and would be an idle and wholly ineffectual process.[6]

Procedure

Application for an order may be made *at any time* after the decree.[7] An order may be retrospective to the date when service of the application for a settlement was effected upon the wife or her solicitors,[8] but it is final and unalterable once it is made. " It may be doubtful whether or not the court can, as part of the settlement, order payment of a lump sum." [9] The court overcame the difficulty of accrued arrears which in effect had accumulated from the date of the application to the date of the court's order by requiring the wife to secure a greater proportion of her assets than would otherwise have been necessary to provide the ordered annual sum so that during the following seven or eight years the arrears could be cleared off, and the surplus assets then released to the wife.[9]

Drafting the Settlement

Singleton L.J.[10] doubted whether conveyancing counsel of the court could be brought in without the consent of the parties (which was given in that case). In *Hunter* v. *Hunter and Waddington* [11] Scarman J. was faced with the problem, having ordered a settlement of the wife's property situated in England, and the wife having refused to execute any settlement, whether, without resort to attachment (ineffectual because of the wife's foreign residence) and without infringement of the authority of the courts of her foreign domicile, the court could give effect to its order. Scarman J. was not impressed by the argument that the Matrimonial Causes Act, 1950,

5 [1961] 2 W.L.R. 691.
6 *Tallack* v. *Tallack and Broekema* [1927] P. 211.
7 Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1, and Matrimonial Causes Rules, 1957, rule 44 (1), as amended by Matrimonial Causes (Amendment) Rules, 1958.
8 *Style* v. *Style and Keiller* [1954] P. 209 at pp. 218, 222.
9 *Ibid.* at p. 219.
10 *Ibid.* at p. 220.
11 *Supra.*

ss. 19 (2) and 22 (4), confer express power on the court to refer the question of drafting to conveyancing counsel of the court, whereas section 24 is silent. He did not think that silence indicated the absence of the power, and thought also that the Matrimonial Causes Rules, 1957, rule 82, covered the case. Bucknill and Hodson J.J. appear to have assumed the existence of the power. But he held that even if the court cannot of its own motion refer the drafting to conveyancing counsel of the court, it has power to give directions for the preparation of the instrument it considers to be necessary. The possible injustice in the husband causing the drafting to be carried out is safeguarded by the necessity of the court's approval of the draft before execution. By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 47, the court may appoint a person to execute the necessary deed quite independently of the power of attachment, *i.e.*, without giving the refusing party the option of imprisonment.[12]

Principle

The principle to be applied by the court is that the power to order a settlement is not to be used as a penal sanction against a wife who has committed a matrimonial offence, but to ascertain and make good the pecuniary damage to the husband and the children of the marriage caused by the wife's offence.[13]

Terms

The amount to be settled by the wife is a matter for the discretion of the court. One third is a rule of practice,[14] but not a rule of law. Where there are five children of the marriage,[15] or the wife is a woman of considerable wealth,[16] the court may well be justified in ordering more than a third to be settled. The usual practice is for the court to order a fixed rather than a fluctuating sum.[17] It has been said (in 1893) that the principle of the *dum sola* clause is inapplicable to the case of a husband,[18] though one might have thought that any real probability of the husband remarrying was a relevant matter to be taken into account. The property may be settled for the children of the marriage for the whole of their lives, but it is customary to provide for their maintenance, education and benefit until they reach the age of twenty-one.[19]

[12] See *Howarth* v. *Howarth* (1886) 11 P.D. 68, 95.
[13] *March* v. *March and Palumbo* (1867) L.R. 1 P. & D. 440; *Matheson* v. *Matheson* [1935] P. 171.
[14] *Shorthouse* v. *Shorthouse* (1898) 78 L.T. 687; (1899) 79 L.T. 366.
[15] *Midwinter* v. *Midwinter* [1893] P. 93.
[16] *Style* v. *Style and Keiller* [1954] P. 209 at p. 217.
[17] *Midwinter* v. *Midwinter* [1893] P. 93 at p. 97.
[18] *Ibid.* at p. 98.
[19] *Barker* v. *Barker* [1944] P. 77.

In *Moy* v. *Moy and White* [20] the wife had a fortune of £32,000 and the husband £8,000. There was one child of the marriage, aged five years. The wife had contributed approximately £150 p.a. to the running expenses of the marriage; the husband, a stockbroker, earned a fluctuating income of £1,000 p.a. on average, with prospects of improvement. The wife's argument that no settlement was necessary at all since the child could in appropriate circumstances obtain a maintenance order against her or alternatively that her contribution should not exceed £150 p.a. were rejected, since her contribution might well have increased in the future when the child commenced his education, and it was desirable to set aside a definite sum of money for the child since the parents might become less willing or able to provide for him because of remarriage, birth of more children, change in circumstances, and so on.

The court ordered that £8,000 should be settled on the following terms:

1. The trust to contain a provision that until the child should attain twenty-five he should be the primary object of the trust.
2. Until the child attained twenty-one:
   discretionary trust, child and husband as objects;
   accumulation of surplus income;
   power to advance whole of capital to child.
3. Child over twenty-one but under twenty-five:
   discretionary trust, child and wife as objects (all income to be disposed of);
   power to advance whole of capital to child.
4. Child over twenty-five:
   income to child, remainder to wife;
   power to advance whole of capital to child.
5. Death of child before twenty-five leaving no widow nor issue:
   property to revert to wife.

In *Hunter* v. *Hunter and Waddington* [21] the husband's capital amounted to £20,000 and a half share in the former matrimonial home, worth £2,125, and his income was £2,670 p.a. The wife, who had remarried, had a reversionary interest valued at £14,775 at the date of the application and a half share in the former matrimonial home, worth £2,125. Abroad, she also owned investments worth £2,000 and a house. There were two children of the marriage, aged eight and six years, without independent means. The court ordered a settlement for the benefit of the children of one half of the wife's reversionary interest subject to her life interest therein and the whole of her interest in the former matrimonial home.

[20] [1961] 1 W.L.R. 552 (C.A.).

[21] *Supra.*

HOTCHPOT ON INTESTACY

By J. T. Farrand, ll.b., Solicitor

There is an assumption implicit in our legal literature on the topic of distribution of estates on intestacy which may have very important practical consequences and which appears to the writer to be unjustified and erroneous. This assumption is that the present statutory provision [1] for hotchpot on intestacy enjoys the same basic rules as are applicable to hotchpot in equity when the presumption against double portions arises,[2] or under a normal form of hotchpot clause.[3] Thus in Wolstenholme & Cherry's *Conveyancing Statutes* [4] it is stated that the statutory provision in question "is a case of 'satisfaction' or partial satisfaction." That this assumption is general appears from the common fact of joint treatment in the books without any distinction of the rules applicable. Thus the book (*Trust Accounts*, by P. M. B. Rowland) from which newly admitted solicitors have necessarily [5] learned the rules as to distribution of estates gives no intimation at all that the rules differ, merely referring [6] to the statutory provisions which are set out verbatim and without comment in an Appendix. This book's predecessor, the well-known Chandler's *Trust Accounts*,[7] adopted the same joint treatment and assumption, though it is fair to add that it noticed certain of the differences in the rules.[8]

It is proposed in this article to examine the rules applicable to hotchpot on intestacy in an endeavour to show that the general assumption of one basic set of rules for hotchpot both in equity and on intestacy is in certain vital respects too complacent. Comparatively speaking, very few cases involving questions of hotchpot on intestacy have come before the courts for the simple reason that in

[1] s. 47 (1) (iii) of the Administration of Estates Act, 1925, as reprinted in the Intestates' Estates Act, 1952, Sched. I.

[2] *i.e.*, in the equitable doctrines of satisfaction (or ademption) of legacies by portions and satisfaction of portion-debts by legacies or portions.

[3] By "normal" is meant one which does not vary the equitable rules.

[4] 12th ed., Vol. II, p. 1502.

[5] It is prescribed by the Law Society for its Intermediate Examination.

[6] 2nd ed., p. 101.

[7] 6th ed., pp. 141–151.

[8] This also is the position with Ranking, Spicer & Pegler's *Executorship Law and Accounts*, 20th ed., by H. A. R. J. Wilson, pp. 198–205, N. E. Mustoe's *Executors and Administrators*, 5th ed., pp. 129–136, *Williams on Executors and Administrators*, 14th ed., by G. W. Keeton, pp. 911–912, *Emmet on Title*, Vol. 2, 14th ed., by Gilchrist Smith, p. 432, and Halsbury's *Laws*, Vol. 16, 3rd ed., p. 404, and see also the general survey by B. B. Benas in (1942) 6 *Conveyancer*, 181 and 228.

practice they are more often than not settled out of court by way of compromise between the persons interested. It really goes without saying that, before agreeing to a compromise, one (or one's client) should understand what is being compromised. Accordingly, if the general assumption as to the rules applicable is accepted, and normally it is, then in the writer's opinion many of these common compromises have been made on the basis of a false understanding.

Commentary on the Statutory Provision

The statutory provision for hotchpot on intestacy, now contained in the Administration of Estates Act, 1925, and reprinted by the Intestates' Estates Act, 1952, is as follows:

> " S. 47.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:
>
> . . . .
>
> (iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;"

The most convenient way of discussing this statutory provision and of demonstrating the difference in the rules applicable from the rules of hotchpot in equity will, it is thought, be by means of a commentary on the salient phrases as follows:

(i) " *Where the property held on the statutory trusts for issue is divisible into shares* "

This first point may be taken quickly. It is emphasised by the words quoted that the statutory provision for equality on intestacy is only applicable as between issue. There must be more than one of the issue entitled in order for the statutory provision to apply,[9]

[9] *Re Ashton* (1934) 78 S.J. 803.

so that any accounting will *not* be for the benefit of strangers, *i.e.*, persons other than those entitled under the statutory trusts for issue. The position appears to be the same even on a partial intestacy where the requirements as to bringing into account, as extended by section 49 (1) (*a*) of the Administration of Estates Act, 1925, might, were it not for this construction, result in an increase in the property available to satisfy the rights of a surviving spouse.[10]

Here at least the rule applicable is the same as in equitable hotchpot; see *Re Heather* [11] where Swinfen Eady J., holding that the doctrine of satisfaction did not apply, said [12] that " a rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger."

(ii) "*Any money or property* "

In order for the equitable presumption against double portions to arise, it is a well-established rule that both the portions [13] must be *ejusdem generis*,[14] *e.g.*, neither land for money nor money for land. However, this rule has no place at all as an element in the statutory provision for hotchpot on intestacy.

On the one hand, the property held on the statutory trusts for issue will be the whole or part of the residuary estate of the intestate,[15] which can only be ascertained subject to the imposition of a statutory trust for sale [16] and therefore, whatever the property is in fact, it must be regarded as money in accordance with the doctrine of conversion.[17] On the other hand, however, what is to be brought into account against this money (actual or notional) is " any money or property . . . paid " etc.,[18] and " property " is widely defined [19] as including " a thing in action and any interest in real or personal property." Thus it is clear that the *ejusdem generis*

[10] *Cf. Re Vaux* [1938] Ch. 581 where Simonds J. held in respect of a pre-1926 partial intestacy that the presumption against double portions applied for the benefit of children and did not operate to increase the surviving spouse's entitlement (reversed on appeal [1939] Ch. 465 without deciding this point). It is considered that hotchpot on intestacy will not increase the half of the residuary estate in which the surviving spouse has a life interest under s. 46 (1) of the Administration of Estates Act, 1925 (as amended in 1952).

[11] [1906] 2 Ch. 230 (residue left between stranger and single child who had been advanced).

[12] At p. 234.

[13] *i.e.*, either the legacy and portion or the portion-debt and the legacy or portion.

[14] *Re Jaques* [1903] 1 Ch. 267, 274, C.A.; *Re Aynsley* [1915] 1 Ch. 172, 176 (C.A.); *cf. Re George* [1947] 1 Ch. 154 (property advanced not *ejusdem generis* with pecuniary legacy but valued).

[15] See the opening words of s. 47 (1) of the Administration of Estates Act, 1925.

[16] See s. 36 (4) and (1) of the Administration of Estates Act, 1925.

[17] See *Fletcher* v. *Ashburner* (1779) 1 Bro.C.C. 497, 499.

[18] " That is, one would suppose, a reference to money or property as a physical or, at any rate, a tangible fact and not to an interest in money or property ": *per* Danckwerts J. in *Re Morton* [1956] Ch. 644, 647 *sed quaere*.

[19] s. 55 (1) (xvii) of the Administration of Estates Act, 1925.

rule of the equitable presumption against double portions is not a condition precedent to hotchpot on intestacy.

(iii) " *By way of advancement or on the marriage* "

In order for the equitable presumption against double portions to arise both the gifts in question must be in the nature of portions. As to the meaning of the word " portion," it may be permissible to quote Professor G. W. Keeton [20]:

> " The term ' portion ' is one which has been very often considered by courts of equity although an exhaustive definition presents difficulties. It may be regarded as a substantial provision for a child, with the object of establishing that child in life, as distinct from a casual payment."

Professor Keeton then quotes in support from *Re Lacon* [21] and *Re Vaux* (1939).[22]

However, the word " portion " does not appear in the present statutory provision for hotchpot on intestacy. It is to be noted that the language of this provision's predecessor, section 5 (3) of the Statute of Distribution, 1670, in this respect differed radically, since it referred to any child who had had " any estate by settlement from the said intestate " or had been " advanced by the said intestate in his lifetime by portion." The leading judgment on these latter words is that of Jessel M.R. in *Taylor* v. *Taylor* [23] as follows: " I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind." This is essentially identical to Professor Keeton's definition of a portion in equity for which, indeed, the case is also cited as authority.

Since there is a difference in the language of the two statutory provisions, prima facie at least, it might be thought that the present statutory provision ought to be construed in accordance with the ordinary principle of giving every word its natural meaning in its present context, not controlled by an earlier repealed statutory provision although attaching some significance to the present omission of the word " portion." It is true that, by its long title, the Administration of Estates Act, 1925, is a consolidating Act,[24] but this fact would not affect this principle of construction since

20 *Introduction to Equity*, 5th ed., at pp. 261–262.
21 [1891] 2 Ch. 482.
22 *Supra.*
23 (1875) L.R. 20 Eq. 155, 157.
24 Intestates' Estates Act, 1952, is an amending Act, but it merely reprints the provision under consideration.

two amending Acts [25] were consolidated and not the Statute of Distribution, 1670.[26]

However, it appears from the recent Court of Appeal decision in *Re Hayward*,[27] which is now the leading case, that this prima facie view of the construction is only partly correct. On the one hand, unlike the Statute of Distribution, 1670, the language of the present provision seemed to Jenkins L.J.[28] " to show that it is not every settlement the benefits taken under which must be brought into account, but the settlement must be either by way of advancement or on the marriage of the child concerned." On the other hand, it was stated, again by Jenkins L.J.[29] that " the first thing that has to be established in any case of this kind is that the gift, which it is said should be brought into account, was in itself in the nature of an advancement by portion." Accordingly, the learned Lord Justice had earlier said [30] " To my mind section 47 (1) (iii) of the Administration of Estates Act, 1925, is, if anything, narrower than the provisions of the Statute of Distribution, but decisions upon the old Act are, I think, generally speaking, applicable to the new," and in effect he followed the judgment of Jessel M.R. in *Taylor* v. *Taylor*, *supra*.[31]

Therefore, despite the omission of any reference to portions, the present statutory provision for hotchpot on intestacy is in fact the same in this respect as both its predecessor and the equitable presumption against double portions.

(iv) " *Child of the intestate* "

The equitable presumption against double portions is capable of arising whenever a donor is either the father of or proved to be *in loco parentis* to the donee.[32] The presumption does not automatically arise simply because the donor is the mother of the donee, though it will arise if she is proved to be *in loco parentis* to the donee. " Prima facie the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstances can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact to be so." [33] Thus the rule for mothers

[25] Law of Property Act, 1922, and Law of Property (Amendment) Act, 1924.
[26] See *Grey* v. *I.R.C.* [1960] A.C. 1.
[27] [1957] Ch. 528.
[28] At pp. 537–538.
[29] At p. 540.
[30] At p. 535.
[31] The other members of the Court of Appeal, Sellers and Vaisey L.JJ., agreed entirely with Jenkins L.J.
[32] *Suisse* v. *Lowther* (1843) 2 Hare 424, 435.
[33] *Per* Stirling J. in *Re Ashton* [1897] 2 Ch. 578 (reversed by the Court of Appeal on further evidence without discussion of this point of law [1898] 1 Ch. 142 (C.A.)); see also *per* Younger J. in *Re Eyre* [1917] 1 Ch. 351, 356, and *cf. Re Eardley* [1920] 1 Ch. 397.

is the same as for donors other than the father, namely that a person is *in loco parentis* if he (or she) places or intends to place himself (or herself) in the position of lawful father, in the sense of having a duty to make provision for the donee, which is a question of fact.[34] Quite clearly the presumption would arise automatically where the donee is the adopted child of the donor,[35] and, admittedly without considering authority to the contrary,[36] Jessel M.R. in *Re Lawes* [37] spoke as if the presumption automatically arose in the case of an illegitimate child.[38]

These rules which apply to the equitable presumption against double portions are both too narrow and too wide to fit the statutory provision for hotchpot on intestacy. There are three reasons for the misfit. First, the statutory provision applies where there is payment to a child of the intestate by the intestate. " Intestate " is simply defined [39] to include " a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate." Thus there is nothing in the context to prevent the word " intestate " comprehending both males and females in accordance with the Interpretation Act, 1889.[40] Therefore, no distinction can be made here between an intestate mother and an intestate father. It cannot be argued with any force that the words " by way of advancement," which must be by portion,[41] import the equitable distinction between mother and father since these words relate to the nature of the payment and not to the nature of the donor. Second, to be within the statutory provision the relationship of donor to donee must be that of parent (father or mother) and child. There is no apparent room for the equitable extension to a donor *in loco parentis* to the donee, except (as with the equitable rule) where the donee is the adopted child of the intestate.[42] Possibly unlike the equitable rule, however, an illegitimate child (or his issue) of the intestate [43] will not be within the statutory provision unless the intestate is the mother and leaves no legitimate issue.[44] It is also to be noted that where the whole or any part of the

34 *Cf. Ex p. Pye* (1811) 18 Ves. 140, 154; *Powys* v. *Mansfield* (1837) 3 My. & Cr. 359, 370.
35 See *Twining* v. *Powell* (1845) 2 Coll. 262.
36 *e.g., Grave* v. *Earl of Salisbury* (1784) 1 Bro.C.C. 425; *Perry* v. *Whitehead* (1801) 6 Ves. 544.
37 (1881) 20 Ch.D. 81, 86 (C.A.).
38 " . . . being the natural son of the testator, the testator stood *in loco parentis* towards him. . . . "
39 s. 55 (1) (vi) of the Administration of Estates Act, 1925.
40 s. 1 (1) (*a*).
41 See *Re Hayward, supra.*
42 s. 16 (1) of the Adoption Act, 1958.
43 Not having been legitimated at common law (see, *e.g., Re Grove* (1888) 40 Ch.D. 216) or under the Legitimacy Acts, 1926 and 1959.
44 s. 9 (1) of the Legitimacy Act, 1926.

residuary estate of an intestate is held on the statutory trusts for any class of relatives of the intestate other than issue, then the hotchpot provision is expressly excluded.[45]

Third, in the case of a *partial* intestacy, the statutory provision for hotchpot on intestacy applies to *issue* of the deceased in respect of benefits acquired under the deceased's will.[46] This last is, of course, much wider than the equitable rule, where there would have to be proof that the deceased was *in loco parentis* to remoter issue.[47]

(v) " *Paid to such child by the intestate* "

In *Re Reeve* [48] Clauson J. held that funds transferred by the trustees of a marriage settlement to a son in pursuance of an appointment in his favour made by his father in exercise of a special power of appointment amongst his children are *not* " money or property . . . paid . . . by the intestate " within section 47 (1) (iii) of the Administration of Estates Act, 1925. Accordingly, the funds, since they were paid by the trustees, did not have to be brought into account.

As a direct contrast to this decision on the statutory provision for hotchpot on intestacy is the position in equity. It is quite clear that the equitable presumption against double portions can arise where property is appointed by a father to his child under a special power of appointment.[49]

(vi) " *Subject to any contrary intention expressed or appearing from the circumstances of the case* "

The equitable presumption against double portions depends basically upon the intention of the donor with regard to the second (or allegedly satisfying) portion given.[50] There may, of course, be an express declaration of intention by the donor in the documents of gift, or there may be other intrinsic evidence,[51] which will either raise or prevent the raising of the presumption in the first place. Otherwise, the rule is that extrinsic evidence will not be admitted to raise or to support the presumption, but once the presumption has

[45] s. 47 (3) of the Administration of Estates Act, 1925.

[46] s. 49 (1) (*a*) of the Administration of Estates Act, 1925; *Re Young* [1951] Ch. 185; and see *infra* as to issue bringing into account advancements to children.

[47] *Re Dawson* [1919] 1 Ch. 102 (grandchild a stranger).

[48] [1935] Ch. 110.

[49] *Re Peel* [1911] 2 Ch. 165; see also *Re Eardley*, *supra*—these cases were not apparently considered in *Re Reeve*, *supra*.

[50] *Per* the Lord Chancellor, and see the definition of satisfaction adopted by Lord Romilly, both in *Lord Chichester* v. *Coventry* (1867) L.R. 2 H.L. 71 at pp. 82 and 95 respectively; note that here it is not the intention whether or not the gift was a portion but whether or not it is to be brought into account which is relevant.

[51] *e.g.*, the two portions being or not being *ejusdem generis*, see *supra*.

arisen, extrinsic evidence is admissible to rebut it and therefore also to support it.[52]

However, there is authority for the proposition that parol evidence of declarations of intention made by the donor are only admissible under this rule provided the declarations are made prior to or contemporaneously with the second portion given [53] and it is likely that the same rule applies to acts, as opposed to declarations, of the donor indicating his intention.[54]

The statutory provision for hotchpot on intestacy clearly contemplates, in the wide terms quoted, its own rebuttal by an apparent contrary intention. Three questions arise (the first two of which will only be briefly considered). First, what amounts to a " contrary intention "? Second, how may contrary intention be shown? Third, when may a contrary intention be shown?

First, a " contrary intention " may mean one of three things:

(a) a specific intention that the particular payment or settlement shall not be brought into account; or

(b) a specific intention that the statutory provision for hotchpot on intestacy shall not apply; or

(c) a general intention contrary to the operation of the statutory provision for hotchpot on intestacy.

It will be appreciated that (a) and (b) involve a knowledge of the statutory provision, which few intestates are likely to have. For this reason (c), which only involves an intention to make an out-and-out gift, and does not require knowledge of the statutory provision, is preferred. This preference is reinforced by the construction recently confirmed by the Court of Appeal [55] of the words "if and so far only as a contrary intention is not expressed in the instrument " in section 69 (2) of the Trustee Act, 1925, namely that a direction to accumulate being contrary to the operation of section 32 of that Act was a sufficient expression of a contrary intention.[56]

Second, a contrary intention as above may be " expressed " or appear " from the circumstances of the case." Since the latter would comprise the former, it is submitted that on a proper construction the two ought to be treated as alternatives. That is to say, that only if no intention is expressed is it permissible to look at the circumstances of the case. Otherwise the general rule that

52 *Kirk* v. *Eddowes* (1844) 3 Hare 509; *Montagu* v. *Earl of Sandwich* (1886) 32 Ch.D. 525, 535 (C.A.); *Re Scott* [1903] 1 Ch. 1 (C.A.).

53 See *per* Wigram V.-C. in *Kirk* v. *Eddowes* (1844) 3 Hare 509, 522; *Ford* v. *Tynte* (1864) 2 Hem. & M. 324; *Re Shield* [1912] 1 Ch. 591; and *Re Deprez* [1917] 1 Ch. 24.

54 *Cf. Shephard* v. *Cartwright* [1955] A.C. 431.

55 *I.R.C.* v. *Bernstein* [1961] 2 W.L.R. 143.

56 See also *Re Turner* [1937] Ch. 15.

extrinsic evidence cannot be admitted to contradict an expressed intention would here be flouted. " But what a man intends and the expression of his intention are two different things. He is bound and those who take after him are bound by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail." [57]

Third, the equivalent in the presumption against double portions to the statutory provision for hotchpot on intestacy is either the ademption of a legacy or the satisfaction of a portion-debt by a portion. There, as stated, declarations of and acts indicating the testator-donor's intention subsequent to the portion are not admissible to rebut the presumption. Here the rule depends entirely on the proper construction of the words quoted from the statutory provision. These words contain no restriction as to time and permit a contrary intention to appear " from the circumstances *of the case*." [58] It is not said that the contrary intention is to appear from the circumstances merely of the payment or advance. Therefore, it is thought that the word " case " means the intestacy and the administration resulting therefrom.[59] Thus the expression " the circumstances of the case " admits all and any evidence of a contrary intention, whether or not subsequent to the payment or settlement, provided it does not contradict an expressed intention.[60]

Again there is a vital difference in the rule applicable to hotchpot on intestacy from that applicable to hotchpot in equity.

(vii) " *The share which such child would have taken if living at the death of the intestate* "

The equitable presumption against double portions, as already stated,[61] arises only where the donor is either the father of or proved to be *in loco parentis* to the donee, so that only such a donee has to bring a portion into hotchpot. Further, this equitable presumption

[57] *Per* Sir Gorrell Barnes P. in *Simpson* v. *Foxon* [1947] P. 54, 57; and see *Shore* v. *Wilson* (1842) 9 Cl. & F. 355.

[58] Assuming there is no expressed contrary intention, see *supra*.

[59] See *Harnfstaengl* v. *American Tobacco Co.* [1895] 1 Q.B. 347 at pp. 352–353 where Lord Esher M.R. stated the expression " as the case requires " (in s. 11 of the International Copyright Act, 1886) to mean " as the transaction which is being dealt with requires." Here the transaction being dealt with is the distribution on intestacy.

[60] As to the width of the expression in other contexts, see further *Allcroft* v. *London* (*Bishop*) [1891] A.C. 666; *Elwes* v. *Hopkins* [1906] 2 K.B. 1; *Simpson* v. *Simpson* [1954] 1 W.L.R. 994 (C.A.); *Upsons* v. *E. Robins* [1956] 1 Q.B. 131 (C.A.); and *Hayfield* v. *Hayfield* [1957] 1 W.L.R. 473.

[61] See the discussion of the meaning of " child of the intestate."

cannot apply where the two portions are given to different donees.[62] Thus in equity a donee only brings into hotchpot portions which he himself has received.

The effect of the statutory provision for hotchpot on intestacy, however, is that, on the one hand, advances to grandchildren or remoter issue are *not* directed to be brought into account at all,[63] but that, on the other hand, grandchildren or remoter issue, who can only take an interest by substitution,[64] must bring into account any advances to the child whose issue they are. Thus in hotchpot on intestacy a beneficiary may have to account for advances which he himself has never received.[65]

(viii) " *At a valuation (the value to be reckoned as at the death of the intestate)* "

Where the equitable presumption against double portions applies, the rule is that the value of the portion to be brought into hotchpot is to be taken as at the time it was given.[66]. There is one established exception to this rule, an exception based on somewhat questionable reasoning, namely that if the portion is subject to estate duty,[67] the portion is brought into hotchpot after deducting the estate duty.[68]

In this point of the time at which to value the advance lies the clearest and most startling difference between the statutory and equitable rules. The equitable rule of valuing at the date of the advance " seems to be both good sense and good law," [69] and the statutory rule of valuing at the date of death may therefore be

62 Except in some case of ademption, see *per* Lord Romilly M.R. in *Lord Chichester* v. *Coventry* (1867) L.R. 2 H.L. 71, 95; see also *Rose* v. *Rogers* (1870) 39 L.J.Ch. 791; *Mayd* v. *Field* (1876) 3 Ch.D. 587; and *Re Blundell* [1906] 2 Ch. 222.

63 Contrast the position on a partial intestacy, s. 49 (1) (*a*) of the Administration of Estates Act, 1925, and *Re Young* [1951] 1 Ch. 185—" Any member of the family belonging to a certain branch must bring in everything that has been taken or acquired under the will by that branch " (*per* Harman J. at p. 189), but *cf.* the decision of Danckwerts J. in *Re Morton* [1956] Ch. 644 mentioned below.

64 Under s. 47 (1) (i) of the Administration of Estates Act, 1925.

65 The statement in Wolstenholme & Cherry's *Conveyancing Statutes*, 12th ed., Vol. II at p. 1052 that " if the property advanced is settled on the child and his or her issue, *semble*, the capital value of the entire advance would be brought into account, not merely the value of the life interest given to the child," must now be taken to be incorrect in view of the contrary decision of Danckwerts J. in *Re Morton*.

66 *Watson* v. *Watson* (1864) 33 Beau. 574; *Re Innes* (1908) 125 L.T.Journ. 60.

67 *i.e.*, as a gift *inter vivos* under s. 2 (1) (*c*) of the Finance Act, 1894, and s. 47 of the Finance Act, 1946.

68 *Re Beddington* [1900] 1 Ch. 771, Byrne J.'s reasoning (at p. 774) being that what had been advanced and had to be valued was property liable to be charged with estate duty in a certain event which had happened; followed by Sargant J. in *Re Crocker* [1916] 1 Ch. 25 though with a certain lack of conviction; *cf. Re Dawson*, *supra*.

69 *Per* Sargant J. in *Re Crocker* [1916] 1 Ch. 25, 30.

thought to be the opposite. For example, in *Re Reeve*,[70] a case of hotchpot on intestacy, Clauson J. said [71] that " it is quite obvious that at the death of the intestate the life interest surrendered by him five years before, which of course comes to an end on his death, if it is reckoned as at the death of the intestate, is of the value of nil, and accordingly nothing is to be brought into account." Compare with this the facts of *Re George* [72] where the equitable presumption against double portions was applied to a gift of all the live and dead stock on two farms. A value had, in fact, been put on the stock at the time of the gift, but if such a gift had had to be valued as at the death of the donor, perhaps many years later, difficult problems of descent, to say nothing of other complexities, would arise. Again Danckwerts J. decided in *Re Morton* [73] that life interests which have to be brought into account should be valued according to the relevant actuarial considerations; here clearly there can be nothing but depreciation between the date of the gift and the date of the donor's death.

Finally, it is suggested that the principles to be applied in ascertaining the property to be valued as at the date of the intestate's death, will be those which were applied prior to the passing of the Finance Act, 1957,[74] to ascertain the property deemed to pass on death for estate duty purposes as being comprised in a chargeable gift *inter vivos*.[75] Thus the property to be valued at the death of the intestate is the property originally given or advanced whether or not by way of settlement.[76] It follows that accretions such as bonus shares issued after the advance are to be ignored [77] and that if the property has ceased to exist by the death of the intestate nothing has to be brought into account.[78] In the result the same abuses are open to donees of portions as led to the amendment of the estate duty position in 1957,[79] although it is true that such a donee cannot rely on the donor's death intestate.[80]

70 [1935] 1 Ch. 110.
71 At p. 117.
72 [1949] 1 Ch. 154.
73 [1956] 1 Ch. 644.
74 See s. 38.
75 Under s. 2 (1) (*c*) of the Finance Act, 1894, and s. 47 of the Finance Act, 1946, such gifts *inter vivos* also having to be valued as at death: *Lord Strathcona* v. *I.R.C.*, 1929 S.C. 800.
76 See *Sneddon* v. *Lord Advocate* [1954] A.C. 257.
77 See *Att.-Gen.* v. *Oldham* [1940] 2 K.B. 485 (C.A.).
78 See the dicta in *Re Reeve* above and *Att.-Gen.* v. *De Préville* [1900] 1 Q.B. 223 (C.A.) (also release of life interest); see also dicta in *Iveagh* v. *I.R.C.* [1954] Ch. 364, 379 (debenture that has been redeemed).
79 s. 38 of the Finance Act, 1957.
80 It is interesting that the donee may now find himself paying estate duty although not liable to bring anything into account.

(ix) "*In accordance with the requirements of the personal representatives*"

With reference to these words, it is stated in Wolstenholme & Cherry's *Conveyancing Statutes* [81] that: "A discretion is given to the representatives as to the mode of valuation, for life interests have to be taken into account, but this discretion must be exercised judicially. For the power to value for the purpose of giving effect to the provisions of 'any statute': Trustee Act, 1925, s. 22 (3)." [82] The power given by this last-mentioned statutory provision without doubt also applies where the equitable presumption against double portions arises.[83]

However, an alternative construction in respect of the phrase quoted prima facie suggests itself, namely that it does not refer to the valuation but to the bringing into account. In other words it may be that the personal representatives are given a discretion whether or not advances should be brought into account. This construction would be based on the fact that, as the statutory provision stands, the words "at a valuation" are grammatically isolated by appearing between commas and are thus an interpolation to be ignored in seeking the sense of the sentence which should be read: "shall be brought into account in accordance with the requirements of the personal representatives." However, even on this reading it can be said that the personal representatives have a discretion merely as to the mode of accounting and not as to the bringing in, which latter is provided for immediately before these words.[84] But the point, if raised, is most likely to be concluded in favour of Wolstenholme & Cherry's construction in accordance with the following well-known principle of interpretation:

> "While notice may therefore in my view be taken of punctuation in construing a statute, a comma or the absence of a comma must, I think, be disregarded if to give effect to it would so alter the sense as to be contrary to the plain intention of the parties." [85]

[81] 12th ed., Vol. II, at p. 1503.

[82] S. 22 (3) of the Trustee Act, 1925, provides:

> "Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust."

[83] See the extremely wide definition of "trustee" in s. 68 (17) of the Trustee Act, 1925.

[84] And after all the personal representatives do not need any further discretion as to the valuation since they already have the necessary powers by virtue of s. 22 (3) of the Trustee Act, 1925.

[85] *Per* Lord Jamieson in *Alexander* v. *Mackenzie*, 1947 S.C.(J.) 155, 166.

Valuation of the Estate

There remain to be considered three further points which are of vital practical significance in that they relate to the value of the intestate's estate for hotchpot purposes. These are points which are not dealt with expressly in the statutory provision just discussed but in which there appear to the writer to be important differences between the rules of hotchpot on intestacy and hotchpot in equity respectively. These three points are:

(a) the date at which the property held on the statutory trust for issue is to be valued;

(b) the position as to interest between the date of death and the date of distribution; and

(c) whether advances should be brought in against the value of the property in (a) before or after deduction of estate duty on that property.

(a) Date for valuing the estate

Since the rule (whatever it may be) applicable to hotchpot in equity will also apply to hotchpot on intestacy unless varied by the statutory provision, and since there is no express variation, it is necessary to start by considering the position where there is a case for hotchpot in equity. However, it may be appropriate to indicate now that it will be submitted ultimately that the statutory provision in fact impliedly varies what is probably, though not certainly, the equitable rule.[86]

There are only two serious contenders in the field for selection as the date at which to value the estate for hotchpot in equity. That is, either (1) value the estate as at the date of death [87] and then distribute the estate actually available at the date of distribution in the same proportions, or (2) merely value the estate as at the date of actual distribution.[88] It will be understood that the date of valuation is only important if the value of the estate either appreciates or depreciates between these two dates. For the benefit of those, who, like the writer, may be unable without the assistance

[86] As will be appreciated, this submission cannot, in any case, be made until after a consideration of what this equitable rule is.

[87] *i.e.*, of the testator or tenant for life, *i.e.*, when the fund becomes held on trust to distribute immediately.

[88] A third choice, namely value as at the date of retainer for legacy duty purposes, was suggested to and rejected by Farwell J. in *Re Gunther* [1939] Ch. 985; and a possible fourth choice, namely, value as at the end of the executor's year was mentioned but always in conjunction with the date of death also by Farwell J. in *Re Mansel* [1930] 1 Ch. 352, and it would appear that there is much to be said for this fourth choice: see s. 44 of the Administration of Estates Act, 1925, and *Re Fawcet* [1940] Ch. 402, but contrast *Re Parry* [1947] Ch. 23 (where power to postpone conversion, ending of executor's year immaterial).

of figures to visualise the practical implications depending upon which date is chosen, compare the positions on the following simple figures: residuary estate valued at death of testator at £12,000 to be distributed equally between A and B; A to bring into hotchpot £6,000; actual distribution takes place, say, three years after the testator's death, during which time the estate has doubled in value. The alternative distribution accounts will be as follows:

		A	*B*
(1) Estate valued at death:	£12,000		
A brings into hotchpot:	£6,000		
Divide equally	£18,000		
		£9,000	£9,000
Deduct advance to A:		£6,000	
Notional distribution:		£3,000	£9,000
Divide estate actually to be distributed in same proportions (1:3):	£24,000		
Actual distribution:		£6,000	£18,000

		A	*B*
(2) Estate valued at distribution:	£24,000		
A brings into hotchpot:	£6,000		
Divide equally:	£30,000		
		£15,000	£15,000
Deduct advance to A:		£6,000	
Distribution:		£9,000	£15,000

Thus, on these figures, there is a difference in the sums distributed of £3,000, and the difference would be as great *mutatis mutandis* had the estate depreciated. Take a larger estate and the sums involved may be considerable.

There are two lengthy and conflicting lines of authority on the question of which of these two contending dates, the date of death and the date of actual distribution, should be chosen as the date at which to value the estate. First in support of the date of death:

Re Hargreaves [89]; *Re Gilbert* [90]; *Re Mansel* [91]; *Re Gunther* [91a]; and *Re Oram*.[92] Second, in support of the date of actual distribution: *Re Ponser* [93]; *Re Craven* [94]; *Re Forster-Brown* [95]; *Re Cooke* [96]; *Re Tod* [97]; *Re Wills* [98]; and *Re Hillas-Drake*.[99]

It is fair to say that the line of authorities in favour of the latter date, concluding as it does with the powerful judgment of Simonds J. in *Re Hillas-Drake*,[1] is generally preferred,[2] although usually with a *caveat* that the directions of the court should in practice be sought. As will be seen, it is not necessary to the purpose of this article to distinguish between these two dates on the merits, but it may be appropriate to indicate briefly why the writer hesitates to accept the general preference for what may be called the *Hillas-Drake* line.

In *Re Hillas-Drake* Simonds J. first points out [3] that " since the object of a hotchpot provision is to ensure equality between beneficiaries, it is relevant to ask what date for valuation will serve that end." The learned judge then proceeds to give an example sufficiently similar to (but a little more complex than) that given above. On the example his view is [4] " if I take the date of distribution as the proper date, I have no difficulty in securing equality." As for taking the date of death, he says [5]: " It is, indeed, almost certain that I shall obtain inequality in greater or less degree," adding [6]: " So far from equality being produced by this method of hotchpot, the advanced beneficiary loses in this distribution substantially more than he has gained by his advancement. Conversely, if the assets have depreciated between the death and the date of distribution, this method of applying the hotchpot provision will allow the beneficiary to retain a substantial advantage."

With all due respect to the learned judge, this assessment overlooks the fact that equality is not absolute but relative. The value of the advance is for hotchpot purposes artificially frozen as at the date of the gift (or, in intestacy, as at the date of death). The

89 (1903) 88 L.T. 100 (C.A.).
90 [1908] W.N. 63 (Neville J.).
91 [1930] 1 Ch. 352 (Farwell J.).
91a [1939] Ch. 985 (Farwell J.).
92 [1940] Ch. 1001 (Bennet J.).
93 [1908] 1 Ch. 828 (Warrington J.).
94 [1914] 1 Ch. 358 (Warrington J.).
95 [1914] 2 Ch. 584, 591 (Sargant J.).
96 [1916] 1 Ch. 480 (Younger J.).
97 [1916] 1 Ch. 480 (Sargant J.).
98 [1939] Ch. 705 (Simonds J.).
99 [1944] Ch. 235 (Simonds J.).
1 *Supra.*
2 See, *e.g.*, B. B. Benas in (1945) 9 *Conveyancer*, 29.
3 At p. 238.
4 At p. 238.
5 At p. 238.
6 At p. 239.

actual value of the advance will almost certainly differ from this artificial value as time passes and the property given appreciates or depreciates, due perhaps to the acts or omissions of the donee. The same can be said of the value of the estate: whilst the artificial value of the advance to be brought into hotchpot remains static the actual value of the estate almost certainly moves away due perhaps (at least since the death) to the acts or omissions of the deceased's personal representatives. It would seem that the nearest to equality will be achieved by freezing the value of the estate at the nearest date to that at which the value of the advance is frozen. Further, the actual date of distribution is, of course, almost entirely up to the personal representatives, as Farwell J. said in *Re Gunther* [7] (representing the opposition to the *Hillas-Drake* line): " Having regard to the fact that, if a date other than that of the death is taken, it must depend to some extent upon the individual executors, it seems to me desirable, if possible, to take one which is not so dependent." This view is not novel: the equitable principle of regarding that as done which ought to be done is the basis of the well-known corollaries to the rule in *Howe* v. *Lord Dartmouth* [8] which apply when, as is invariably the case, a duty to convert has not immediately been performed.[9] In addition a valuation as at the date of death avoids the practical flaw in Simonds J.'s advocacy of valuation as at the date of actual distribution which is the difficulty, if not impossibility, of actually valuing and distributing an estate of any size on the same day. In practice, when the personal representatives are prepared to distribute they have the estate valued at a convenient date and then distribute by way of appropriation of investments as at that date during the following few weeks. Since during these weeks the values may fluctuate we have the very variation deplored by the learned judge.

Be the merits as they may, it appears impossible to resolve the conflict between the two lines of authority, at least for the purposes of hotchpot in equity, without resort to counting heads [10] until the decision of an appellate court. It is true that the line of support for a valuation as at the date of death stems from the Court of Appeal decision in *Re Hargreaves* [11] but, in the opposing line of decisions (all at first instance), it has been consistently found possible to distinguish this decision as turning entirely on the wording of the particular will in question. Indeed, the latter line bases its very

7 [1939] Ch. 985, 991.
8 (1802) 7 Ves. 137a.
9 See *Re Earl of Chesterfield* (1883) 24 Ch.D. 643; *Re Fawcet* [1940] Ch. 402; *Re Parry* [1947] Ch. 23—*i.e.*, the 4 per cent. rule.
10 *Cf.* Justinian's *Law of Citations.*
11 (1903) 88 L.T. 100.

existence on this distinction which was originally made in *Re Poyser*,[12] the first of the line.[13] No such distinction, however, was present or accepted in the decisions following *Re Hargreaves*; instead the view in these was that the Court of Appeal laid down a general rule only to be departed from to avoid injustice.[14] Thus there is, in fact, a real conflict between the two lines which should not continue to be resolved by resort to the unsatisfactory practice of distinguishing.

However, the object of this exercise is to discover the rule applicable to hotchpot on intestacy. Here, thankfully, we need not be left suspended between the two lines of authority, undecided whether to distinguish or not to distinguish *Re Hargreaves*.[15] The reason is simple: it is not possible, even if it were desirable, to distinguish the statutory provision for hotchpot on intestacy from the facts of *Re Hargreaves*. The hotchpot clause contained in the particular will in that case concluded by providing [16]

> " and for that purpose any such stocks, funds, or securities should be treated as of the value thereof at the average price of the day on the day of his [the testator's] death."

There was nothing else indicating a date at which to value the estate. On this, Cozens Hardy L.J. said [17]:

> " On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated. The hotchpot clause contains an express provision that the securities that are to be brought into hotchpot are to be ascertained at the average price of the day at his death. It would be very singular indeed if part were to be ascertained in that way and the rest not."

Now, it will be recalled that the statutory provision for hotchpot on intestacy similarly provides that advances are to be brought into account " at a valuation (the value to be reckoned as at the death of the intestate)." It is submitted that it is only possible to conclude that Parliament's intention coincided with that attributed by the Court of Appeal to the testator in *Re Hargreaves*, namely, that

[12] [1908] Ch. 828, 838.
[13] See also *per* Simonds J. in *Re Wills* [1939] Ch. 705, 715–716 and 717–718.
[14] In addition, in *Re Gunther*, Farwell J. considered (at p. 991) that *none* of the cases mentioned were relevant to the present question of valuing the capital of the estate since in those cases the court was dealing with income when other considerations may arise. The writer's view (which is that expressed, or at least not dissented from, in the other cases mentioned) is that the two questions cannot be treated separately, see *infra*.
[15] (1903) 88 L.T. 100.
[16] See 86 L.T. 44.
[17] At 88 L.T. p. 101; he agreed as did Collins M.R. with the main, but less quotable, judgment delivered by Romer L.J.

the property held on the statutory trusts for issue is also to be valued as at the death of the intestate for the purposes of hotchpot on intestacy.[18] Thus the values of both estate and advance will be artificially frozen at the same date, which is a convenient date in practice since the estate at least will then have been valued for estate duty purposes.

(b) Position as to interest

Both *Re Hargreaves* and *Re Poyser*,[19] together with most of the other cases in their respective descendant line of authorities, were concerned not only, or mainly, with the question of the date at which to value the estate but also with the question of the position as to interest during the period between the date of death and the date of actual distribution. With regard to the relationship between these two questions, the writer entirely agrees with the view expressed by Simonds J. in *Re Hillas-Drake*,[20] as follows:

> " These two questions are logically inter-connected, for if the assets of the estate ought to be valued at the death of the testator for the purpose of hotchpot so that the fractional share of each beneficiary in the ultimately distributable estate is once and for all determined on that basis, it would surely be logical that each beneficiary should have the same fractional share of the income since the death and it would be unnecessary to have recourse to the method of adjustment which has been commonly adopted, namely, that the advanced beneficiary should bring into hotchpot on income account 4 per cent. per annum on the amount of his advances and be debited therewith against his share of such income." [21]

For the benefit again of the writer and others (if any) unable to visualise the difference between the two methods without the assistance of an illustration, take the figures used in the examples as to

[18] By way of indirect support for this submission, see for example *Re Halstead* [1937] 2 All E.R. 570 where the words " advancement *or benefit* " in s. 32 (1) of the Trustee Act, 1925, were construed by Farwell J. by following the construction put by Jessel M.R. in *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166, 170 on a similar wording in a clause in a will which had been said in argument (*ibid.* p. 168) to be " not an ordinary advancement clause." See also *Re Ropner* [1956] 1 W.L.R. 902, and *Re Wills* [1959] Ch. 1; *cf. Re Pilkington* [1961] 2 All E.R. 330 (C.A.).

[19] [1908] 1 Ch. 828.

[20] *Supra*, at p. 237.

[21] Note that the latter method mentioned only involves the advanced beneficiary accounting for the 4 per cent. per annum as from the date of the donor's death: *Re Rees* (1881) 17 Ch.D. 70, and that in *Re Foster* [1920] 1 Ch. 391 it was held that the hotchpotting of income should be done before deduction of income tax, although naturally the beneficiaries only receive net sums (*cf. Re Wills* [1939] Ch. 705 and *Re Hillas-Drake*, *supra*, where net sums were, without argument, used throughout).

valuing the estate and assume that the income of the estate for the second year after the testator's death totalled £800.[22] If the former of the two methods stated by the learned judge is used then the £800 is distributed in the proportions 1 to 3 (£3,000 to £9,000) so that A received £200 and B £600. If the latter method is used the distribution is as follows:

		A	*B*
Income of estate:	£800		
Add 4 per cent. on A's advance (£6,000)	£240		
Divide equally	£1,040		
		£520	£520
Deduct 4 per cent. on A's advance		£240	
Actual distribution		£280	£520

Once again it will be seen that there is a substantial difference in result between the two methods.

However, there can be no doubt that in a case of hotchpot on intestacy the former method of distribution of income must be adopted. Not only does it follow, as Simonds J. says, logically from the conclusion as to the date at which to value the estate, but it was, in fact, adopted in *Re Hargreaves*, the case to be followed. Which method is to be adopted in a case of hotchpot in equity remains as uncertain, however, as the date at which the estate is to be valued for the same purpose.

(c) Estate duty

The question which arises here is whether an advance on which estate duty is not charged [23] should be brought into hotchpot against the gross or the net estate.[24] So far as the hotchpot in equity position is concerned, the question may be and usually is answered by reference to the judgment of Clauson J. in *Re Tollemache* [25] in which the learned judge concluded [26] as follows:

> " The proper mode of distributing the fund was not by bringing the advanced sums into hotchpot against what remained of the

[22] Ignoring income tax for simplicity!

[23] *i.e.*, because, say, it was given more than five years before the donor's death: s. 47 of the Finance Act, 1946, extending s. 2 (1) (*c*) of the Finance Act, 1894.

[24] If both the advance and the estate are chargeable to estate duty at the same rate then it matters not whether both are gross or are net for hotchpot purposes, the net distribution being the same, but since the reduced rate relief provided by s. 64 of the Finance Act, 1960, where the donor survived the gift *inter vivos* by more than two years, this situation will be less frequent.

[25] [1930] W.N. 138.

[26] At p. 139.

fund after deducting the amount of estate duty, a process which would involve an equal distribution of the duty, but by bringing the advances into hotchpot against the gross fund before deducting the duty, the effect of which would be to leave each beneficiary to bear the duty chargeable in respect of the sum which he received as his share at the death."

The present writer's view of equality differs from that of Clauson J. since the learned judge's method in fact leads to inequality, and also fearsome complexities appear to arise where an advance enjoys the reduced rate relief provided by section 64 of the Finance Act, 1960.

However, the decision has stood for thirty years and it is not proposed to attack it now in its application to hotchpot in equity; instead it will be demonstrated that it *cannot* apply to hotchpot on intestacy. Before demonstrating this latter point, it may once again assist if an illustration is given of the difference in figures between bringing advances into account against the estate respectively before and after deducting estate duty. Take the figures given above for the example as to valuing the estate, assume that the estate duty totals £720 (*i.e.*, 6 per cent. of £12,000) and accept method (1), *i.e.*, valuation at date of death, as correct. First, if the advance is brought into account against the *gross* estate, then before the distribution (which must be net) estate duty is deducted in the proportions one to three, so that A bears £180 and B £540 of the estate duty. Second, if the advance is brought into account against the *net* estate, since the division is equal before the advance is deducted from A's otherwise half share, then it is obvious that the estate duty is also divided equally, so that A and B each bear £360 thereof.

Although apparently the fact is not generally appreciated, it is the second of the above two methods which, it will now be demonstrated, applies to a case of hotchpot on intestacy. The reasoning is as follows:

(a) by virtue of section 47 (1) (iii) of the Administration of Estates Act, 1925, advances have to be brought into account in or towards satisfaction of a share of the property held on the statutory trusts for issue;

(b) the property held on the statutory trusts for issue is the residuary estate of the intestate [27];

(c) by virtue of section 33 (4) of the Administration of Estates Act, 1925, " the residuary estate of the intestate " means " the residue of the said money and any investments for the time being

[27] See the opening words of s. 47 (1) and s. 46 (1) (i), Table (2) (*b*), of the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952.

representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid ";

(d) " the said money " is a reference to the net money arising from the trust for sale and conversion imposed by section 33 (1) of the Administration of Estates Act, 1925, as to both the real and personal estate of the intestate;

(e) " the residue of the said money " means the residue after the performance of the duty imposed in respect of the money by section 33 (2) of the Administration of Estates Act, 1925, in the following terms: " out of the net money . . . the personal representatives shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of the Act ";

(f) the rules of administration referred to merely provide for the order in which the estate is applicable towards discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout, which order is inapplicable to an intestacy since item 1 is " property undisposed of by will " [28];

(g) there is no definition in the Administration of Estates Act, 1925, of the expression " testamentary and administration expenses," but in the construction of wills the two words have been regarded as synonymous and as meaning those expenses incident to the proper performance of the duties of a personal representative [29]; since the words " and other liabilities . . . properly payable " are added, there is no doubt whatsoever that the expression comprehends estate duty [30];

(h) therefore, advances are to be brought into account against the estate after deduction of estate duty and the rule in *Re Tollemache* does not apply; **Q.E.D.**

Conclusion

It is to be hoped that the above exposition has made it apparent that the topic of hotchpot on intestacy must be considered, far more often than not, quite separately from the case-law rules applicable to hotchpot in equity. Indeed the statutory provision for hotchpot

[28] See s. 34 (3) and Sched. I, Pt. II, of the Administration of Estates Act, 1925.
[29] See *per* Jessel M.R. in *Sharp* v. *Luck* (1874) 10 Ch.D. 468, 470.
[30] See *Re Clemow* [1900] 2 Ch. 182; *Re Anstead* [1943] Ch. 182; and *Re Ridley* [1950] Ch. 415. In so far as these cases relate to the incidence of estate duty they are inapplicable to an intestacy where no distinction is to be made between realty and personalty. The administrators are accountable for the estate duty on both the pure personalty and the land of the intestate: see s. 16 (1) of the Law of Property Act, 1925.

on intestacy, on a proper construction, contradicts all but a very few of the equitable rules.[31] No doubt the economical practice of settling out of court any questions arising as to hotchpot on intestacy will continue. But it is suggested that the customary basis and terms of such settlements may require reassessment, particularly in view of the three points made above as to valuation of the estate.

Finally, it may be that the views of some at least of the readers of this article can, being *ejusdem generis*, easily be brought into hotchpot with the views of Danckwerts J. expressed as follows [32]:

> " . . . the question which I have to consider is a tiresome and irritating subject, hotchpot. For some reason, which is difficult to fathom, but presumably with an idea of producing fairness, the draftsmen of the Administration of Estates Act, 1925, introduced hotchpot provisions into the sections of the Act dealing with intestacy. It seems to me that they made a great mistake in so doing, and that it would have been far better to have left the whole thing out."

What more can one say, save that like Mount Everest the statutory provision for hotchpot is there and must therefore be scaled?

31 *Cf.* the hotchpot provision contained in s. 32 (1) (*b*) of the Trustee Act, 1925, which does not so contradict.

32 *Re Morton* [1956] Ch. 644, 647.

ASSENT TO THE VESTING OF A LEGAL ESTATE ACQUIRED BY AN EXECUTOR AFTER THE DEATH OF THE TESTATOR

By Sir Lancelot Elphinstone, Barrister-at-Law

The case of *Re Stirrup's Contract* [1] is a good example of the difficulty caused by the rather absurd, and probably unintentional, restriction imposed—or assumed to be imposed—by section 36 of the Administration of Estates Act, 1925, on the executor's power to assent to the vesting of a legal estate. If the testator was the estate owner, the legal estate devolves on the executor who may convey it by an assent in writing under section 36. But if the testator was not the estate owner and the executor acquires the legal estate after the death, then, it is said, the legal estate has not devolved on the executor and must be conveyed to the person entitled by deed.

In *Re Stirrup's Contract*, the testator, Richard Stirrup, who died in 1908, devised a freehold house to his wife, Jane, for life and thereafter to his daughter, Hannah Evans, absolutely. Hannah died in 1925, having appointed Richard Stirrup junior and her husband David Teewyn Evans to be her executors. Jane died in 1930, having appointed Richard junior to be her executor.

On July 20, 1932, Richard junior conveyed the house to himself and David on the trusts of Hannah's will. But it was common ground that as the administration of Hannah's estate had not been completed, Richard junior and David held the house as Hannah's executors.

Richard junior died on September 15, 1943, and David died on October 27, 1957, having appointed the National Provincial Bank to be his executor who thereby became Hannah's executor by representation. On October 28, 1958, the bank executed an assent under seal in favour of Ruth Jones (described as the beneficiary) who had become beneficially entitled to the house in fee simple. The operative part of the assent provided: " The bank as personal representative of David Teewyn Evans deceased hereby assent to the vesting in the beneficiary of [the premiser] in fee simple. . . ."

The applicant, the successor in title of Ruth, having agreed to sell the property, asked for a declaration that a good title to the house had been shown. It was agreed for the purposes of the summons that since the property had not devolved on the bank as

[1] [1961] 1 W.L.R. 449.

personal representative, but had been conveyed to its predecessors after the death of the testatrix, Hannah, a conveyance should have been used by the bank in place of an assent.

Wilberforce J. accepted it as common ground that a conveyance should have been used, but decided that the assent of October 26, 1958, being under seal and showing a clear intention to pass the legal estate in fee simple, operated as a valid conveyance to the beneficiary. Accordingly the vendor had shown a good title.

His lordship based his decision primarily on the judgments of Plumer M.R. in *Cholmondley* (*Marquis*) v. *Lord Clinton* [2] and of Lord Mansfield in *Edwards* d. *Goodtitle* v. *Bailey*.[3] Plumer M.R. had said: " if the meaning and intention of the grantor be clearly manifested on the face of the instrument, as to the person or character intended to be the object of grant, and if the words which he has made use of to convey his meaning will admit of an interpretation conformable to it, though contrary to their correct technical sense, there is no case or dictum to be found which requires the court to adopt the technical sense, in opposition to the actual meaning [of] the party: on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form."

And Lord Mansfield said: " The rules laid down in respect of the construction of deeds are founded in law and common sense; that they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention."

His lordship said that the statements quoted were " persuasive to the extent, that, as a matter of general approach, once the court is satisfied that the intention of a document is to pass the legal estate in fee simple, it should not allow that intention to be defeated by the fact that instead of the word ' grant ' or ' conveyance,' the word ' assent ' is used."

His lordship also referred to the Law of Property Act, 1925, ss. 51, 52, 63 and 205 (i) (ii), which showed that " on the broad framework of the Act, provided that the sole formal requirement of being under seal is complied with, any document, since 1925, at any rate, is effective to pass a legal estate, provided that the intention so to pass it can be ascertained."

One may respectfully agree with the decision. But the assumption that the assent, had it not been under seal, would have been invalid seems open to question, the point being that the bank assented, not as the personal representative by representation of

2 (1820) 2 Jac. & W. 1, 91, at p. 93.
3 (1777) 2 Cowp. 597, 600.

Hannah (as stated in the head note to the report), but as the personal representative of David in whom the house was vested as " real estate held in trust."

The relevant statutory provisions are as follows:

By section 1 (1) of the Administration of Estates Act, " real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death . . . devolve from time to time on the personal representative of the deceased. . . ." By section 3 (1) " real estate " includes " real estate held on trust (including settled land)." There is no saving clause to this definition such as " unless the context otherwise requires " or the like. By section 36 (1), " a personal representative may assent to the vesting in any person entitled thereto . . . of any estate or interest in real estate to which the testator or intestate was entitled . . . and which devolved upon the personal representative."

The effect of these provisions was as follows.

On the death of Jane, the tenant for life and estate owner, the legal estate devolved on Richard junior, her executor, who could, therefore, have conveyed it to Hannah's executors by an assent under section 36: see the Settled Land Act, 1925, s. 8. In fact, he conveyed it by deed which was, of course, equally effective.

Hannah's executors held the legal estate as joint tenants, the result being that on the death of David, the survivor, the legal estate, being " real estate held on trust," devolved on the bank as David's executor. It seems certain that " real estate held on trust " includes real estate held by an executor who, as was said by Lord Lindley in *Re Davis*,[4] " was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own. . . ." The word " trust " is not defined by the Administration of Estates Act; but by section 68 (17) of the Trustee Act, 1925, " trust " includes the duties incident to the office of a personal representative, and in *Harvell* v. *Foster* [5] Lord Evershed M.R. clearly thought that the definition of " trust " in the Trustee Act applied to the Administration of Estates Act.

By section 7 (1) of the Administration of Estates Act, the bank, being the executor of David, became Hannah's executor by representation. But if the legal estate having been acquired by Hannah's executors after her death did not devolve on them under section 1, then the provision in that section that real estate shall devolve *from time to time* on the personal representative of the deceased did not apply, and the legal estate did not devolve on the bank as the personal representative of Hannah by representation. But the legal

[4] [1891] 3 Ch. 119.
[5] [1954] 2 Q.B. 367 at p. 380.

estate, being real estate held by David on trust, did devolve on the bank as David's personal representative. It follows that the assent dated October 28, 1958, being expressed to be made by the bank "as personal representative of David," would have been valid without being sealed as a deed.

It is interesting to consider what would have been the effect of the assent by the bank had it not been sealed and had been expressed to be made as the personal representative of Hannah. As has been shown above, the bank had power to assent as personal representative of David, but not as personal representative of Hannah. In all other respects the assent was in order. Would the assent be void by a reference to the wrong power? It is submitted that the assent, although not under seal, would have been valid. The bank held the legal estate and could have and clearly intended to pass it to Ruth. The assent would have fallen within the rule laid down by Lord Mansfield "that they [deeds] shall operate according to the intention of the parties. And if they cannot operate in one form, they shall operate in that which by law will effectuate the intention." [6]

Section 36 does not require that the assent should refer to the power, and it is well settled that a reference to the power or to the property constitutes a sufficient indication of intention to exercise a power and that a reference to the wrong power does not invalidate the execution of the power.[7]

It should also be noticed that an executor who acquires a legal estate after the death of the testator is not always incompetent to convey it by an assent not under seal. For instance, if in *Re Stirrup* Jane, the tenant for life, had died before Hannah, and her executor having failed to convey the legal estate to Hannah had after her death assented to it vesting in Hannah's executor, the assent would relate back to the date of Jane's death and Hannah would be regarded in law as being entitled to the legal estate at her death.[8]

It seems probable that an assent by conveyance would also relate back to the death if an assent under section 36 could have been used, and it was clear that the conveyance was intended to operate as an assent. Section 36 (5), (6) and (7) assume that an assent or conveyance by a personal representative has the same effect. It would, therefore, be in conformity with the principles of construction applied in *Re Stirrup* to hold that the conveyance would relate back to the death.

6 This rule applies to documents under hand: see *Ford* v. *Beech* (1848) 11 Q.B. 852, and *Stratton* v. *Pettit* (1855) 16 C.B. 420.

7 *Re Eardley-Wilmot* (1861) 29 Beav. 614; *Re Ackerley* [1913] 1 Ch. 510, 515.

8 Administration of Estates Act, 1925, s. 36 (2).

Finally on this subject, it is arguable that the major premise in *Re Stirrup*, that an executor is incompetent to assent under section 36 to the vesting of a legal estate acquired after the death of the testator, is erroneous. Briefly, the arguments are (1) that under the Administration of Estates Act a legal estate acquired by an executor after the death of the testator does devolve on the executor as an interest in real estate " to which the deceased was entitled at the time of his death," and which by merger has become a legal estate; and (2) that as by the Administration of Estates Act, s. 1, real estate devolves on the executor in like manner as did chattels real before the Act, therefore the common law rule that a legal interest in personal estate acquired by an executor after the death vests in him *virtute officii* as from the death, now applies to real estate, the result being that a legal estate in land acquired by an executor after the death now devolves on him as from the date of the death.

The question—which concerns equitable interests only—depends on the meaning of " real estate," " entitled " and " devolve " in sections 1, 3 and 36 of the Administration of Estates Act.

By section 1 (1) " real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative of a deceased person." And by section 2 (1) ". . . all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him.".

By section 3 (1), " ' real estate ' includes (i) chattels real, and land in possession, remainder, or reversion,[9] and every interest in or over land to which a deceased person was entitled at the time of his death."

If the deceased had an equitable fee simple in possession, he was entitled at the time of his death to an immediate conveyance of the legal estate. If he was entitled in reversion, he was entitled to a conveyance of the legal estate when the reversion fell into possession. In either case, the right was an immediate existing right which the deceased could assign or devise, although in the case of a reversion the right could only take effect *in futuro*,[10] and these rights devolved on the executor under section 1.

[9] " Reversion " is used throughout as including " remainder," and " executor " as including " administrator."

[10] See citations from *Fearne on Contingent Remainder* and *Cruise's Digest* in *Mann Crossman & Paulin* v. *Land Registrar* [1918] 1 Ch. 202, 208.

When an executor acquires a legal estate, his equitable estate merges in the legal estate. The merger takes effect by operation of law,[11] and to hold that a legal estate so acquired was not " an interest to which the deceased was entitled at the time of his death " would be unrealistic.

" Entitled " is not the same as " owned," and the Administration of Estates Act does not require that the deceased should have been the estate owner. " Entitled " is the word commonly used by conveyancers and the judiciary to describe the potential or future right of a reversioner to become the absolute owner of the property when the reversion falls into possession. Thus in an assignment of a reversionary interest, the interest would be described as " All that share to which the assignor is entitled in reversion expectant on the death of ——— in the property," or words to that effect. Similarly, a covenant to settle other or after-acquired property to which the settlor was entitled at the date of the settlement extends to a reversionary interest, and will bind the property when it falls into possession.[12]

It follows that when an executor acquires a legal estate to which the deceased was entitled *in futuro*, the condition required for devolution by sections 1 (1) and 3 of the Administration of Estates Act is fulfilled. The Act does not require that the devolution should be immediate or direct from the deceased. On an intestacy this could never happen. By section 9, where a person dies intestate, his real and personal estate, until administration is granted, vests in the Probate judge. On grant of administration, the real estate vests in the administrator. His title is derived solely from the grant and not from the intestate,[13] and relates back only where the act to be ratified was necessary for the protection and benefit of the estate.[14] Nevertheless, it was decided that in such a case the real estate devolved on the administrator under section 1 of the Land Transfer Act, 1897, the wording of which, so far as material, is the same as in section 1 (1) of the Administration of Estates Act.[15]

The principle already referred to that a legal interest in personal property acquired by an executor after the death of the deceased vests in the executor *virtute officii* as from the death has been applied in many cases. In *Att.-Gen.* v. *Brunning*,[16] purchase-money paid to

11 *Capital and Counties Bank, Ltd.* v. *Rhodes* [1903] 1 Ch. 631, 653. " If testator have sheep, swine, or cows, and they die, and they have young lambs, pigs, or calves, they are assets ": *Kettly's Case* (1585) God. 29, *per* Windham J.

12 *Re Mackenzie's Settlement* (1867) L.R. 2 Ch. 345. And see *Re Bland's Settlement* [1905] 1 Ch. 4; *Re Crook's Settlement* [1923] 2 Ch. 339; and *Re Maltby* [1953] 1 W.L.R. 756.

13 *Meyappa Chetty* v. *Supramanian Chetty* [1916] 1 A.C. 603.

14 *Morgan* v. *Thomas* (1853) 8 Ex. 301, *per* Parke B.

15 *Hewson* v. *Shelley* [1914] 2 Ch. 13, 29, 36. See also *Re Pawley and London Provincial Bank* [1900] 1 Ch. 58.

16 (1830) 8 H.L.C. 243.

the executor for land sold by the testator in his lifetime was held to vest in the executor by virtue of the probate. Lord Campbell L.C. said. " Although the right to the purchase-money was on the condition of a good title being shown and the conveyance being executed, when the condition had been performed it was the same in the result as if the right had been absolute from the beginning."

In *Cook* v. *Gregson*,[17] Kindersley V.-C. held that an equity of redemption of money charged in real estate devolved upon the executor *virtute officii*.

In *Shee* v. *French* [18] and *Re Mouatt*,[19] where settlements were set aside after the death of the settlor under 13 Eliz. 1, c. 5, the property was held to vest in the settlor's executor as legal assets. And in *Mutlow* v. *Mutlow*,[20] it was held that an equitable reversionary interest in personalty when it falls into possession devolves on the executor as legal assets.

These cases show that any legal right acquired by an executor in personal property in which the deceased held an equitable interest devolves on the executor *virtute officii* " as if the right had been absolute from the beginning." [21] There can be no doubt that chattels real would have been treated as personal property and subject to the same rule.[22] This confirms the conclusion that under section 1 of the Administration of Estates Act a legal estate in land acquired by an executor after the death is real estate to which the deceased was entitled at the time of his death and devolves in his executors; the result being that an assent under section 36 will pass the legal estate without being sealed as a deed.

The principles applied in *Re Stirrup* are also relevant to the controversy whether a purchaser from executors, who were also appointed by the will to be trustees for sale and who purport to sell as trustees, can require a written assent from the executors to themselves. As the executors hold the legal estate, an assent is necessary only to show that they now hold the land as trustees for sale. If, therefore, the executors sign a contract to sell as trustees or to convey as trustees for sale, surely that must mean that they now hold the land as trustees for sale and would be interpreted as an assent? [23] Being an assent in writing it would, it is submitted, pass the legal estate to themselves as permitted by section 72 (3) of the Law of Property Act. The purchaser's requisition would, it is thought, be inadmissible.

[17] (1856) 3 Drewry 547.
[18] (1857) 3 Drewry 716.
[19] [1899] 1 Ch. 831.
[20] (1859) 4 Deb. & J. 539.
[21] (1830) 8 H.L.C. at p. 255.
[22] In *Chapman* v. *Bond* (1863) 1 Vern. 188, and *Ratcliff* v. *Graves* (1683) 2 Cas. in Ch. 152; 1 Vern. 196, an attendant term was said to be assets of the estate of the owner of the inheritance.
[23] See *Wise* v. *Whitbourne* [1924] 1 Ch. 460.

SPORTING RIGHTS IN EQUITY

Though it is often of great importance in the field of landlord and tenant law generally to know whether a particular arrangement amounts to a lease or a contractual licence, the basis of the distinction between the two categories has for long been obscure. It had generally been considered that the test to be applied was that of " exclusive possession," but even this is now open to doubt as a result of the decision of the Lord Chief Justice in *Isaac* v. *Hotel de Paris*.[1] In that case it was held that an arrangement under which exclusive possession of part of an hotel was given was a licence, not a lease, because in spite of the exclusive possession element the intention of the parties had been to create no more than a licence. The position now appears to be that the distinction between lease and licence is a question of fact in each case to be determined according to the intention of the parties, and that the existence or otherwise of exclusive possession is not necessarily conclusive.

Where sporting or fishing rights are concerned the position is further complicated by the fact that a legal grant of an incorporeal hereditament separate from the land on which it is to be enjoyed can only be made under seal, even if only a yearly tenancy is proposed. The basis of this rule is apparently that a grant is required to create the profit by severing it from the corporeal land. It appears that the common law rule is unaffected by section 54 (2) of the Law of Property Act, 1925, which permits informal leases taking effect in possession, for a term not exceeding three years. (At common law of course a lease of corporeal land could be granted in any manner, even orally.)

Position in Equity

It is often assumed that the result of the rule requiring a deed for any legal lease of an incorporeal hereditament is that an agreement under hand only or an oral agreement followed by the taking of possession or other act of part performance produces only a licence (not necessarily, however, revocable at will), notwithstanding that the parties intended something in the nature of a tenancy. Before the Judicature Act, 1875, and the decision in *Walsh* v. *Lonsdale* [2] this was in fact the position at law.[3] In equity, however,

[1] [1960] 1 W.L.R. 239.
[2] (1882) 21 Ch.D. 9.
[3] See for example *Bird* v. *Higginson* (1837) 112 E.R. 316, where an action for rent in respect of a shooting licence failed because the agreement showed a demise of an incorporeal hereditament which could only be made by deed.

it had long been held that specific performance would be granted of an agreement for a lease or conveyance, and this doctrine was in fact applied to an agreement for the letting of sporting rights in the equity case of *Frogley* v. *Lovelace*.[4] The result of *Walsh* v. *Lonsdale* was that a person holding under an agreement for a lease was to be regarded in law as well as in equity as if the lease had in fact been granted, since, following the Judicature Act, 1875, equity prevails. Whether this would apply to an agreement not under seal to let sporting rights, or, in accordance with the doctrine that an imperfect lease is to be regarded as a contract for the granting of a lease, to a purported lease under hand only, or to an oral lease with part performance, was not clear, since the basis of the common law rule requiring a deed for the grant of a lease of an incorporeal hereditament was that in the absence of such a deed there was no severance of the profit or easement.

Reference is often made in this connection to *Lowe* v. *Adams*.[5] In point of fact this case did not determine whether the person having the benefit of an agreement under hand only for the enjoyment of sporting rights was to be regarded in law as in the position of a tenant, because of the doctrine in *Walsh* v. *Lonsdale*. Whilst the court (Cozens-Hardy J.) doubted whether the decision in *Wood* v. *Leadbitter* [6] (*i.e.*, that a contractual licence is revocable at will) was still law, having regard to *Walsh* v. *Lonsdale*, it was not stated in the judgment that the arrangement arrived at in the document under hand amounted to, or was to be regarded as, an equitable tenancy. The true basis of the decision would appear to be that expounded in the subsequent line of cases beginning with *Hurst* v. *Picture Theatres Ltd.*[7] to the effect that a contract made for valuable consideration, giving a licence to occupy land, in which it is an expressed or implied term that the contract will not be ended before a certain time or the occurrence of a certain event cannot be revoked before that time or event, whether the contract was by deed or not. Indeed the court in *Lowe* v. *Adams* specifically held that the rules as to the termination of a yearly tenancy of a corporeal hereditament did not apply to the contract under consideration, and that the occupants of the sporting rights were not entitled to six months' notice but only "reasonable notice."

The position of a person enjoying sporting rights under an agreement under hand only, or under an oral grant coupled with part performance, was not finally settled until the decision in *Mason*

[4] (1859) 70 E.R. 450.
[5] (1901) 70 L.J.Ch. 783. See, *e.g.*, Hill & Redman's *Law of Landlord and Tenant*, 15th ed., pp. 119–120.
[6] (1845) 14 L.J.Ex. 161.
[7] (1915) 83 L.J.K.B. 1837.

v. *Clarke*.[8] This somewhat remarkable case concerned an oral agreement for the granting of the rabbiting rights for one year over certain farmland by a limited company in which the freehold rights were vested. The land was subject to an agricultural tenancy under which however all game rights were reserved to the landlord, subject to the Ground Game Act, 1870. The beneficiary of the oral agreement paid £100 for the rights, and was given a receipt. The agricultural tenant interfered with the enjoyment of the rabbiting rights, and the plaintiff sought damages and an injunction in respect of that interference. Much argument was addressed to the question of the legality or otherwise of the original agreement, by reason of the fact that the consideration was stated on the receipt to be towards the bailiff's wages, which, the defendants alleged, was a fraud on the revenue. This point is not of course relevant here, and the court in any event held that the argument as to legality failed. The material aspect of the case is that the House of Lords held that the plaintiff could bring an action in trespass, in spite of the fact that during the relevant period there was no agreement under seal and indeed no written agreement, since the acts done by the plaintiff in exercise of the rights were in part performance or the oral agreement, and the plaintiff therefore had an enforceable equitable profit. The position was clearly put by Lord Morton, in the following terms:

> " A *profit à prendre* is an interest in land, and no legal estate therein can be created or conveyed except by deed.[9] At the time when the respondent did the acts of which complaint is made, there had been no grant by deed of the *profit à prendre* to Mr. Mason but prima facie he had the benefit of an oral agreement for the grant thereof, and he had entered into possession in the only possible way, *viz.*, by exercising his rights therein. . . . Accordingly at the relevant time Mr. Mason had a contract specifically enforceable against the company (*i.e.*, the freeholders), for the grant of a *profit à prendre* and had entered into possession thereof. In these circumstances he was clearly entitled to bring an action for trespass against the respondent."

The existence of an equitable profit was clearly stated in the judgment of Viscount Simonds as follows:

> " Subject to the question with which I must presently deal, Mr. Mason thus became entitled in equity to a *profit à prendre*, *viz.*, the right to enter on the respondent's land and kill rabbits

[8] [1955] A.C. 778.
[9] Law of Property Act, 1925, s. 52.

there, and the respondent had no possible right to gainsay him. The plea, as I understand it, is that Mr. Mason had . . . neither a legal right nor a right enforceable in equity to the *profit à prendre* and, therefore, could not complain of any interference with the exercise of his rights. It is true that he had no legal title, but I concur with my noble friend, in thinking, for the reasons that he gives, that Mr. Mason had a clear equitable title."

This decision makes it perfectly clear that the doctrine in *Walsh* v. *Lonsdale* applies to a profit or other incorporeal hereditament, as much as to any other interest in land. Although the position still remains that there cannot be a legal yearly tenancy of sporting or fishing rights without a deed, the mere absence of a deed will not affect the existence of an equitable tenancy, which for most purposes will be as good as one at law. It should be remembered however that such rights almost certainly are registrable as a land charge Class D (iii).[10] The effect of non-registration would be to make the interest void against the purchaser for money or money's worth of a legal estate in the land over which the profit exists.[11]

Effect of the Distinction

The distinction between a tenancy and a licence of sporting or fishing rights is therefore, it will be seen, on the same basis as the distinction in the case of any arrangement relating to a corporeal hereditament. The absence of a deed does not in any way affect the position.

These questions are not merely academic, since there are occasions when it is of considerable importance to know whether there is a licence, or a tenancy (whether legal or equitable). For example, the rating of sporting or fishing rights is dependent upon whether there has been severance from the freehold, and whether the rights are let for the purpose of section 6 of the Rating Act, 1874. Since the land over which sporting or fishing rights are enjoyed is generally agricultural, if there is no severance, and no separate rateability, no rates are charged at all, because of the exemption of agricultural land. It is assumed in textbooks on rating [12] that a "letting" of sporting or fishing rights can only be made by deed, and that it follows that in the absence of a deed there is no severance, and no separate hereditament which can be rated. Authority

[10] Any "easement, right or privilege over or affecting land," which presumably includes an equitable profit.
[11] Land Charges Act, 1925, s. 13 (2).
[12] See, *e.g.*, *Ryde on Rating*, 10th ed., 682.

for such a view is found in *Rogers* v. *St. Germans Union*.[13] In the judgment in that case, it was assumed that in the absence of a lease under seal the transaction amounted to a mere licence. In the light of *Mason* v. *Clarke* [14] it is now clear that this is not so, and it would appear that *Rogers* v. *St. Germans Union* would now be differently decided.

Another important practical question arises in connection with the application of the Landlord and Tenant Act, 1954. It would appear that incorporeal hereditaments can be " premises " for the purposes of section 23 of that Act.[15] On this basis, fishing or sporting rights occupied for business purposes, or occupied for sporting purposes only by a club,[16] may be protected if there is a tenancy. If there is a mere licence, of course the Act never applies. It is quite clear that an equitable tenancy is sufficient however to bring in the Act, since " tenancy " is defined in section 69 of the Act as meaning " a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease; by an agreement for a lease or underlease; or by a tenancy agreement; or in pursuance of any enactment. . . ."

13 (1876) 35 L.T. 332.
14 *Supra.*
15 See *Whitley* v. *Stumbles* [1930] A.C. 544 (H.L.) and the judgment of Scrutton L.J. in the Court of Appeal [1930] 1 K.B. at p. 393.
16 See the definition of " business " in s. 23 (2) of the Act.

THE FINANCE ACT, 1961—A SUMMARY

By John Cherryman, Barrister-at-Law

This year's Finance Act is notable more for what it does not do than for the changes in the law which it has actually effected. In order to restrain inflationary pressures, increases in indirect taxation are provided for and two new economic regulators are introduced. As an incentive to those with high earned incomes, relief is allowed for surtax purposes in respect of earned income. These measures are considered in detail below.

It seems that the Chancellor is planning to impose some form of tax on short-term capital gains and to simplify the tax structure by assimilating surtax and income tax on individuals and by substituting a company tax for profits tax and income tax on companies. Although none of such plans has been implemented by the new Act, no doubt some of them will bear fruit in the next Budget.

Customs and excise

By section 1 of the new Act, a television advertising duty is imposed on advertisements inserted for payment in television programmes. The duty, which is at the rate of 10 per cent. of the payment made for the insertion of an advertisement, is charged on the person providing the programme. However, the duty so charged is (subject to any agreement to the contrary) recoverable from the person paying for the advertisement. The general effect of the rather complicated provisions of section 2 is that domestic fuel oils, gas oils and kerosene, having previously been exempt from customs duty, become subject to a duty of 2d. a gallon. In addition, the customs duty on some lubricating oils is increased from 1d. to 3d. a gallon. Horticultural producers are given the right to claim repayment of duty paid in respect of heavy oils used by them for heating or soil sterilisation purposes.[1]

It was held in *Customs and Excise Commissioners* v. *Dodd* [2] that the purchase of a ticket in a lottery, run by a football supporters' club, did not constitute a bet so as to attract pool betting duty,[3] because, although the participants in the lottery were given a certain

[1] Finance Act, 1961, s. 3.
[2] [1961] 1 W.L.R. 144.
[3] Under Finance (No. 2) Act, 1947, s. 6.

power of selection which might determine the winner, nevertheless that power was not exercised. The effect of this decision is nullified by section 4 of the Act, which provides that, for the purposes of pool betting duty, the making of payments for the chance of winning money shall be treated as bets, if the payments are made on terms under which the payers have a power of selection, notwithstanding that the same is not exercised. It is important to note that this section does not impose pool betting duty on those lotteries which are deemed not to be unlawful and in respect of which the taking of a ticket does not constitute a bet.[4]

By section 6, vehicles excise duty is increased by 20 per cent. Four-wheeled tractors whose front wheels are close together will no longer be subject to the lower rate of duty applicable to agricultural tractors, but will be charged with duty as goods vehicles.[5]

Section 9 contains the first of the two new economic regulators proposed by the Chancellor. Briefly, the Treasury is empowered by order to increase or decrease by up to 10 per cent. all customs and excise duties and purchase tax. Readers will not need to be reminded that an order has already been made under this section ![6] It is worth pointing out, however, that no order made under the section can continue in force after August 31, 1962, without the sanction of Parliament. This new regulator is undoubtedly an extremely useful new weapon in the armoury of the Treasury in this age of rapidly changing world economic conditions. However, since an increase or decrease in the relevant duties and tax made by order under the section must be of general application, such an increase or decrease is bound to have a disproportionate effect on the price of those goods which bear a high rate of duty or tax. It seems that the idea of a general sales tax has, for the time being at least, been discarded, on the ground that such a tax would give rise to insurmountable administrative difficulties.

None of the other provisions relating to customs and excise is of general interest.

Income tax

The standard rate of income tax for the year 1961–62 and the surtax rates for the year 1960–61 are unchanged.[7]

The most dramatic features of this year's Budget were the Chancellor's proposals for the reform of surtax. These proposals

[4] Finance Act, 1961, s. 3 (3) and see Betting and Lotteries Act, 1934, ss. 23, 24 and 25 and Small Lotteries and Gaming Act, 1956, s. 1.
[5] Finance Act, 1961, s. 8.
[6] Surcharge on Revenue Duties Order, 1961 (S.I. 1961, No. 1388).
[7] Finance Act, 1961, ss. 12 and 13.

are now embodied in section 14 of the new Act and apply with reference to surtax payable on January 1, 1963, in respect of the income of the year 1961–62. This section allows earned income relief for the purposes of surtax, by providing:

(1) that there shall be deducted from an individual's total income for surtax purposes an amount equal to the earned income relief allowed for income tax purposes,[8] and

(2) that, where the earned income of an individual reduced as above exceeds £2,000, there shall be deducted from his total income the lesser of the amount of the excess or £2,000.

Where a husband and wife are separately assessed the amount of relief is to be the same as if there were no separate assessment and such relief is to be apportioned between them. In short, the effect of the section is as follows:

(1) Surtax will not be payable on earned incomes below £5,000;

(2) Earned incomes of between £5,000 and £9,945 will be reduced for surtax purposes by £3,000 plus one-ninth of the difference between £5,000 and the earned income in question; and

(3) Earned income exceeding £9,945 will be reduced for surtax purposes by £3,550.

These surtax reforms apply directly only to earned income, so that a surtax payer who receives no earned income will not benefit from the reforms at all. However, a person who receives both earned and unearned income may pay less surtax on his unearned income due to the earned income relief which he will obtain. No doubt persons with large unearned incomes will endeavour to devise means of converting the same into earned income. It must not be overlooked that, as a result of the enactment of section 14 of the new Act, persons with relatively high earned incomes may not find the execution of deeds of covenant in favour of ex-wives, grandchildren and charities such an attractive proposition as hitherto. It is, of course, true that in ascertaining a person's total income for surtax purposes, the gross amount of annual payments made by him under deduction of tax must be deducted from his gross income. Now, however, it must be borne in mind that, insofar as such annual payments are made out of earned income, earned income relief for both income tax and surtax purposes will be lost *pro tanto*.

[8] *i.e.*, two-ninths up to £4,005 and one-ninth up to £9,945 under Income Tax Act, 1952, s. 211 and Finance Act, 1957, s. 12 (1).

By sections 15 and 16, dependent relative relief [9] and relief for National Insurance contributions [10] are respectively increased.

Sections 17, 18 and 19 of the new Act contain some important and welcome reforms relating to double taxation relief. Hitherto, under double taxation agreements, only tax actually paid abroad has been allowed as a credit against United Kingdom tax in respect of the same income. No credit has been given against foreign tax in respect of which relief has been given abroad with a view to promoting development. This situation is now remedied by section 17, which provides that arrangements for double taxation relief may treat foreign tax, which would have been payable but for such relief as is mentioned above, as having been actually payable. Section 18 deals with a long-standing anomaly, the unfairness of which had recently been underlined in the case of *Imperial Chemical Industries, Ltd.* v. *Caro.*[11] This decision made it clear beyond peradventure that, under the then existing law, if foreign income was used as the basis for assessment to United Kingdom tax for two or more years, relief in respect of the foreign tax attributable to that income could be obtained only once. Under section 18, relief in respect of foreign tax is allowed as often as the foreign income in respect of which such tax is charged, is assessed to United Kingdom tax. Section 19 allows unilateral relief to be given in respect of foreign local taxes which have hitherto been excluded from such relief.[12]

The remaining sections contained in the part of the new Act devoted to income tax are of a heterogeneous nature. Section 20 exempts any clergyman or minister of religion from Schedule A tax in respect of houses occupied by him and either belonging to him as incumbent, or owned by his church. Section 21 exempts from tax certain income of superannuation funds administered in the United Kingdom for overseas employees of a business carried on wholly or partly overseas. Annuities payable under the law of the Federal German Republic relating to the compensation of victims of Nazi persecution are, by section 22, retrospectively exempted from United Kingdom tax, if the same are exempt from taxation under the Federal German law relating to the taxation of such compensation.

Section 23 limits the capital allowances to be given in respect of motor-cars for use in a trade, profession or employment by reference to the maximum expenditure of £2,000. Sections 24, 25 and 26

9 Under Income Tax Act, 1952, s. 216 (1).
10 Under Finance Act, 1960, s. 19.
11 [1961] 1 W.L.R. 529.
12 Income Tax Act, 1952, s. 348.

contain complementary provisions dealing respectively with renewals, allowances, hiring and hire-purchase in relation to motor-cars whose retail cost exceeds £2,000.

Section 28 contains several provisions relating to assessments to tax under Schedule E. Under section 158 of the Income Tax Act, 1952, where tax is deducted from income under the P.A.Y.E. system no formal assessment to tax is normally made unless a tax-payer who has not been assessed for a particular year, within five years of the end of the year in question, requires an assessment to be made. In the past, it has been possible for a person who is taxed under Schedule E to require a formal assessment to be made more than twelve months after the end of a particular year of assessment, in order to take advantage of any new interpretation of the law which may have been established in the meanwhile. Section 28 (1) now provides that any assessment to tax under Schedule E, if made more than twelve months after the end of the year of assessment in question, is to be made in accordance with the practice generally prevailing at the end of such period of twelve months. By section 28 (2) and (3), the tax avoidance device whereby special remuneration escaped tax if paid in relation to a year of assessment already out of time for assessment, is effectively countered.

Section 29 contains a minor amendment to section 443 (4) of the Income Tax Act, 1952, which relates to returns made by industrial and provident societies in respect of recipients of interest.

General and supplementary

Section 30 of the Act provides for the second of the two new economic regulators invented by the Chancellor. This is a payroll tax which, if given effect to by Treasury order, would impose a liability on every employer of up to 4s. a week in respect of each employee, to be collected by means of additional stamps on National Insurance cards. The imposition of such a tax would clearly be effective in withdrawing money from the economy and promoting the most efficient use of skilled labour. However, it would be a somewhat blunt weapon, the use of which would affect those employers whose businesses require large staffs more seriously than those with small staffs and, in addition, would be likely to have adverse effects in areas where unemployment is relatively high. It seems, therefore, that this weapon is one which will be more effective *in terrorem* than in actual use.

The rate of profits tax is further increased by section 31 from $12\frac{1}{2}$ per cent. to 15 per cent. By section 32, excess profits tax,

excess profits levy and special contribution are finally wound up, subject to cases where fraud or wilful default are established.

Section 33 rationalises the stamp duty chargeable on bills of exchange, and promissory notes, by providing that a fixed duty of 2d. shall apply in all cases, which duty may be denoted by an adhesive stamp. Transfers of stock in the course of transactions involving the borrowing of stock by a dealer to enable him to fulfil a contract to sell stock, are given some relief from stamp duty.[13]

Financial provisions relating to the sale and exchange or encashment of National Savings stamps and gift tokens are enacted [14] as a result of the separation of the Post Office finances from the Exchequer by the Post Office Act, 1961.

Finally, it remains to note that provision is made for the early redemption of the Ottoman Guaranteed Loan of 1855, which amounted to £5,000,000 with interest at 4 per cent. guaranteed by the British and French Governments.[15]

[13] Finance Act, 1961, s. 34.
[14] *Ibid.* s. 35.
[15] *Ibid.* s. 36.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Re Edward's Questions—Practice Note [1961] 1 W.L.R. 1285; [1961] 3 All E.R. 580

Husband and wife—dispute as to property—jurisdiction of official referee—Married Women's Property Act, 1882, *s.* 17; *Administration of Justice Act,* 1956, *s.* 15; *R.S.C., Ord.* 36A, *r.* 1.—Cross-summonses by a husband and wife under the Married Women's Property Act, 1882, s. 17, were referred to an official referee, before whom it was pointed out that the Court of Appeal in *Re Humphrey* [1917] 2 K.B. 72 had held that no such reference could be made. However, the official referee, His Honour Percy Lamb q.c., held that the position had been altered by the Administration of Justice Act, 1956, s. 15, and R.S.C., Ord. 36A, r. 1. The Act provides that the rules of court may authorise any matter to be dealt with by an official referee, and the order that any cause or matter in the Chancery Division may be so referred on application if the court or a judge considers it desirable. No such Act or Rule was mentioned in *Re Humphrey, supra.* Consequently His Honour concluded: "I have, therefore, no hesitation in saying that the note [based on *Re Humphrey*] in the practice books and textbooks no longer has any effect."

Allen v. *Allen* [1961] 1 W.L.R. 1186;

[1961] 3 All E.R. 385 (C.A.)

Matrimonial home in name of husband—whether beneficial interest in wife contributing to general expenses.—On marriage in 1936 the plaintiff husband purchased the matrimonial home in his own name and thereafter paid all mortgage instalments. The defendant wife went out to work and applied her earnings to household expenses. In 1960 the parties were divorced and the husband now sought possession of the matrimonial home. (After dissolution of a marriage, of course, section 17 of the Married Women's Property Act, 1882, ceases to apply.)

The Court of Appeal (Lord Evershed M.R., Harman and Donovan L.JJ.) drew a distinction between two factual situations. The first occurred where husband and wife intended to put all their earnings into a joint pool and to pay thereout, *inter alia*, mortgage instalments; here a wife would acquire a beneficial interest in a matrimonial home standing in the name of the husband. The second situation occurred where a husband, having taken on the burden of a mortgage, asked

his wife to earn a contribution to other expenses; here a wife acquired no beneficial interest in the matrimonial home. Unfortunately the county court judge had not stated his findings of fact clearly enough to show which alternative he favoured, and the matter was therefore sent back to him.

The distinction drawn by the Court of Appeal is a fine one, especially as at marriage the parties rarely formulate their intentions at all. In these cases, which turn on their own facts to a large extent, the court inevitably has to make bricks with little straw. If even that is not forthcoming, formal property rights must prevail (*Cobb* v. *Cobb* [1955] 1 W.L.R. 731).

Wuta-Ofei v. *Danquah* [1961] 1 W.L.R. 1238;

[1961] 3 All E.R. 596 (J.C.P.C.)

Possession—vacant land—methods of proof—amount of possession necessary against trespasser.—Proof of possession is always difficult where the land is vacant and unenclosed, so that the active use made of it is negligible (see *Leigh* v. *Jack* (1879) 5 Ex.D. 264; *Williams Brothers Direct Supply, Ltd.* v. *Raftery* [1958] 1 Q.B. 159). In the present case a vacant plot was conveyed to the respondent in 1939, but in 1940 was vested in the Chief Secretary of the (then) Gold Coast by Ordinance. In 1939 the plot was demarcated and about that time the respondent put up corner pillars (height unstated) with her initials thereon. The question before the Judicial Committee was whether the respondent had retained possession until 1948 so as to be able to sue the appellant in trespass, he having begun to build on the land in that year.

The Judicial Committee found for the respondent. Lord Guest dissented from the view expressed by Parke B. in *Brown* v. *Notley* (1848) 3 Ex. 219 that loss of interest connotes loss of possession unless the contrary be positively shown. He stressed rather the fact that against a wrongdoer the slightest possession is sufficient (citing *Bristow* v. *Cormican* (1878) 3 App.Cas. 641) and stated that on the " exiguous " evidence the Judicial Committee found continuation of the respondent's possession proved.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Rycroft's Settlements [1961] 3 W.L.R. 890;
[1961] 3 All E.R. 581 (Ch.D.)

Settled land—powers of tenant for life—contract to lease—apportionment of rent—Settled Land Act, 1925, *ss.* 42, 44, 46, 64, 90, 117.

—This case reveals some perhaps unexpected problems arising out of the powers of leasing conferred by the Settled Land Act, 1925.

In 1961 the plaintiff tenant for life entered into an agreement with a property company, whereby the latter was to redevelop property consisting partly of settled land and partly of the plaintiff's free property and in return was to receive three leases, each of several blocks of property. The leases were to commence not later than December 25, 1972, and the total rent to be £17,500 per annum, more than one-fifth of the annual value of all the properties. The plaintiff, in accordance with a term in the agreement, took out a summons to determine whether the proposed arrangement was within his statutory powers.

Wilberforce J. held, first, that the grant of one of the proposed leases, including both settled and free property, would be inconsistent with the plaintiff's position as trustee (see Settled Land Act, ss. 16, 108), both on principle and on the authority of *Tolson* v. *Sherard* (1877) 5 Ch.D. 19. (In that case, incidentally, Bramwell L.J. perhaps demonstrates the approach to equity of a common lawyer trained before the Judicature Act, 1875: "I do not pretend to know much of the powers or duties of trustees in matters such as this, but I am told, and can well believe, that an obviously imprudent lease is a breach of trust.")

A second difficulty arose from various provisions of the Settled Land Act: a lease under the Act must take effect in possession not later than twelve months after its date, or in reversion after an existing lease with not more than seven years to run (s. 42 (1)); a lease is defined to include an agreement for a lease (s. 117 (1) (x)); a tenant for life "may contract to make any lease and in making the lease may vary the terms with or without consideration, but so that the lease be in conformity with the Act" and such contracts bind his successors in title (s. 90 (1) (iii) and (2)). Wilberforce J. held that the definition in s. 117 (1) (x) referred to "such agreements for leases as in effect amount to a demise of the property, a kind of an agreement for a lease which in equity is equivalent to a lease, and consequently that section 90 is dealing with a different type of agreement, namely, an executory type of agreement to make a lease, which is not equivalent to a demise . . ." ([1961] 3 W.L.R. at pp. 893–894; [1961] 3 All E.R. at pp. 584). The learned judge then held that section 42 (1) applied only to the actual grant of the lease pursuant to the contract; the concluding words of section 90 (1) (iii), cited above, meant only that the lease when granted must comply with section 42 (following *Gas Light and Coke Co.* v. *Towse* (1887) 35 Ch.D. 519 and distinguishing *Re Farnell's Settled Estates* (1886) 33 Ch.D. 599). The conclusion reached on the definition section may be compared with that in *City Permanent Building Society* v. *Miller* [1952] Ch. 840, where despite a similar definition in the Land Registration Act, 1925, s. 3 (x), the context excluded agreements for leases from section 70 (1) (*k*) of the Act—whereby a prospective tenant not in possession failed to establish an overriding interest. Also, the construction placed on sections 42 and 90 is comparable with that placed on section 149 (3) of the Law of Property Act, 1925, in *Re Strand and Savoy Properties, Ltd.* [1960] Ch. 582. Either a

beneficial or a fiduciary owner can now do by contract what he cannot do by the direct grant of a lease.

Nevertheless the plaintiff in the instant case failed by reason of section 44 (3) of the Settled Land Act, which provides that when the rent on a building lease (as this would be—s. 117 (1) (i)) is apportioned, the rent reserved by any lease shall not exceed one-fifth of the annual value of the land and buildings when completed. Wilberforce J. held that, since the total rent exceeded the permitted figure, no possible apportionment could save all the leases. He pointed out, however, that a more detailed proposal could be submitted for approval under either section 46 or section 64 of the Settled Land Act. The jurisdiction conferred by the latter section especially may be valuable when the ideas of the 1925 legislators do not tally with those of present-day commercial practice.

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3. *CHARITIES*

By J. T. Farrand, ll.b., Solicitor

Re Harpur's Will Trusts [1961] 3 W.L.R. 924; [1961] 3 All E.R. 588 (C.A.)

Residuary gift to be distributed amongst institutions having as a main object certain specified charitable work—whether an imperfect trust provision within the Charitable Trusts (Validation) Act, 1954.— The Court of Appeal (Lord Evershed M.R., Harman and Donovan L.JJ.) has unanimously upheld for only slightly diverging reasons the decision of Cross J. (noted *ante,* Vol. 24 at p. 508, where the facts are sufficiently given). It being conceded that the gift was uncertain and not exclusively charitable, the appeal was confined to the invocation of the validating provisions of the 1954 Act. The question in essence was: Can a gift to institutions simpliciter be an "imperfect trust provision" as defined by section 1 (1) of the 1954 Act? The answer was no, the reason being that the definition is limited to "provisions declaring the objects and, more particularly, so describing the objects as to enable effect to be given thereto by application for purposes exclusively charitable" (*per* Lord Evershed M.R. [1961] 3 W.L.R. at 933, deriving some support also from the wording of section 1 (2) (*b*) of the Act). The argument for the Attorney-General that a gift to institutions was the same thing as a gift declaring objects was rejected. The Act requires the trust instrument to declare and describe the objects, not the constitution of the beneficiary. In the present case the main object of the institutions had admittedly to be charitable, but use of the gift was not restricted to that object. The court was further much influenced by the possibility of institutions changing their objects, the more so since the main object specified in the case (the assistance of servicemen wounded in the last world war) was hardly everlasting. Also rejected was the argument for the

Attorney-General that section 2 (1) of the Act is meaningless except to bring institutions within section 1 (1), the ground of rejection being that "imperfect" in section 1 (1) does not necessarily mean invalid so that section 2 (1) is required to save valid though imperfect trust provisions from the application of the Act.

Each of Lord Evershed M.R. and Harman L.J. deplored with patent feeling the drafting both of the 1954 Act, the language of which the Master of the Rolls "found considerable difficulty in following," not understanding section 3 (1) at all (see *ibid.* at p. 298), and also of the testatrix's will which tragically (see *per* Harman L.J., *ibid.* at p. 933) failed to express the gift as exclusively charitable. (With respect, it may perhaps be added that the judgment of Lord Evershed in places rivals the Act itself in obscurity, especially suffering in comparison with the clarity here displayed by Harman L.J.) In both judgments (Donovan L.J. agreed without giving reasons) the result was regretted and with this at least it is impossible not to agree. Can the narrow technical approach adopted in this case to defeat the undoubtedly charitable intentions of the testatrix be regarded with equanimity? Should not equity look to the intent rather than to the form?

Finally, despite the view thereon of Cross J. at first instance (following Harman J., as he then was, in *Re Gillingham* [1958] Ch. 300, 306; on appeal [1959] Ch. 62) having in the meantime been dissented from (by Buckley J. in *Re Wykes* [1961] 2 W.L.R. 115, noted *ante*, p. 164) and the dissent having been made more drastic by Cross J. himself (in *Re Mead* [1961] 1 W.L.R. 1244, noted *ante*, at p. 439), the Court of Appeal expressly found it unnecessary to add anything to what might be called the "reference or not to charity" controversy. Leave was given to appeal to the House of Lords.

4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Finkle v. *Strzelczyk* [1961] 1 W.L.R. 1201; [1961] 3 All E.R. 409 (C.A.)

Rent Acts—recovery of possession—sub-lease of whole premises without consent—resumption of possession of part of premises by statutory tenant before commencement of proceedings—whether statutory tenant protected.—Section 3 (1) and paragraph (*d*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides that a landlord may recover possession of a rent-controlled dwelling-house if "the tenant without the consent of the landlord has at any time after 31st July, 1923, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let," provided, of course that

the court also considers it reasonable to make the order. The Court of Appeal held in this case that (assuming that it is reasonable to do so) a court may make an order for possession against a statutory tenant who has once sub-let the whole of the premises, even though he may subsequently have resumed possession of part of those premises before proceedings are commenced against him. It is not necessary, in other words, that the whole of the premises should still be sub-let at the date when the plaint is issued.

A tenant of four rooms in a certain house, who held over as statutory tenant, had converted these four rooms into independent flatlets, and for a period of some three months all four flatlets had been sub-let to different persons. At the time when proceedings were commenced, however, the statutory tenant had resumed possession of one of them. In dismissing his appeal against an order for possession which had been made against him the court took the view that there is nothing in *Oak Property Co., Ltd.* v. *Chapman* [1947] K.B. 886 to compel a court to give effect to the appellant's contention: and that the reference to the *Oak Property* case by Lord Evershed M.R. in *Hyde* v. *Pimley* [1952] 2 Q.B. at p. 511, which appears to give a contrary impression, must be read in the light of the somewhat unusual circumstances of that case.

Critchley v. *Clifford* [1961] 3 W.L.R. 763; [1961] 3 All E.R. 288 (C.A.)

Rent Acts—premises within the Acts—lease of agricultural holding —sub-lease of farm cottage to sub-tenant not employed on farm—whether sub-tenant protected.—This case raised a difficult question of construction on proviso (iii) to section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that for the purposes of that Act "any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

The facts of the case were relatively simple. The tenant of an agricultural holding of some 200 acres in extent sub-let a farm cottage, which formed part of the holding, to a sub-tenant, who was not employed on the farm and who used the cottage solely for the purposes of occupation by himself and his family, on a weekly tenancy. In due course the tenant served a notice to quit on the sub-tenant, and the question was whether the sub-tenant could claim the protection of the Rent Acts. It was clear on the one hand that if one could look at the contract of tenancy between the head tenant and the sub-tenant in isolation, then the sub-tenant would be in a position to claim protection, since the cottage which had been sub-let was clearly not in itself "a house let together with land other than the site of the house" within the meaning of the proviso. Nor was the cottage excluded from the protection of the Acts by the Seventh Schedule to the Agricultural Holdings Act, 1948, which provides that the Rent

Acts shall not apply to "any dwelling-house which is comprised in an agricultural holding and is occupied by the person responsible for the control . . . of the farming of the holding," since the sub-tenant in the present case was not so responsible, either as tenant or as servant or agent of the tenant. But it was equally clear, on the other hand, that at the time when the cottage was let to the head tenant as part of the farm let to him by the head landlord, it could not have been protected by the Rent Acts, since it was at that time quite clearly "a house let together with land other than the site of the house" within the meaning of proviso (iii); and it was argued from this that since the Rent Acts operate *in rem* and not *in personam*, a dwelling-house which has once been exempted from the Rent Acts on some ground other than its rateable value remains outside the Acts for all purposes (for so long as the exempting circumstances continue to exist) irrespective of who the occupying tenant may be and regardless of the circumstances in which the tenancy of the occupying tenant may have been created.

The Court of Appeal held unanimously that although the sub-tenant would not be in a position to claim protection against the head landlord, if the head tenancy came to an end (see *Cow* v. *Casey* [1949] 1 K.B. 474), he could nevertheless claim the protection of the Rent Acts against the head tenant for so long as the head tenancy continued. The whole question, in their view, depended on the meaning of the word "let" in proviso (iii) to section 12 (2) of the Act of 1920; and they came to the conclusion on this point (applying *Prout* v. *Hunter* [1924] 2 K.B. 736, a case on proviso (i) to the same section) that in this particular context "let" means "let to the occupying tenant." Thus the exemption from the Rent Acts granted by proviso (iii) to section 12 (2) only applies, on this view, where a house is let to an occupying tenant together with land other than the site of the house.

Counsel for the head tenant had based his argument on *Rudler* v. *Franks* [1947] 1 K.B. 530 (where the house was Crown property) and *Percy G. Moore, Ltd.* v. *Stretch* [1951] 1 T.L.R. 66 (which related to a local authority house which was exempted from the Rent Acts by section 3 (2) (*c*) of the Act of 1939). In those cases, however, the houses had acquired a status which they retained for so long as they remained Crown or local authority houses. Proviso (iii) to section 12 (2) of the Act of 1920, in the view of the Court of Appeal, only permits one to consider the tenancy of the occupying tenant. The status of the house before that tenancy began is, in these circumstances, irrelevant.

Leave to appeal to the House of Lords was granted.

5. *PLANNING CASES*

By V. G. Wellings, M.A.(Oxon.), Barrister-at-Law

Southend-on-Sea Corporation v. *Hodgson (Wickford), Ltd.* [1961] 2 W.L.R. 806; [1961] 2 All E.R. 46 (D.C.)

Development—existing user right—estoppel.—A borough engineer wrote to a prospective purchaser of land: "The land has an existing user right as a builders' yard and no planning permission is therefore necessary." Relying on this statement the purchaser bought the land and used it as a builders' yard. Subsequently an enforcement notice was served on him. The court held that, assuming that the statement by the borough engineer was a pure representation of fact (which was doubted), estoppel could not operate to hinder or prevent the exercise by the local planning authority of their statutory discretion under section 23 of the Act of 1947 in deciding whether to serve an enforcement notice, since this discretion was intended to be exercised for the benefit of the public or a section of it.

Estoppel cannot operate to prevent or hinder the performance of a positive statutory duty: see *Maritime Electric Co.* v. *General Dairies* [1937] A.C. 610. Lord Parker C.J. said that there was no logical distinction, as regards estoppel, between the prevention or hindrance of a positive statutory duty and the prevention or hindrance of the exercise of a statutory discretion.

George Cohen 600 Group, Ltd. v. *Minister of Housing and Local Government* [1961] 1 W.L.R. 944; [1961] 2 All E.R. 682 (D.C.)

Development—material change of use—use of site for reception and sorting of scrap metal.—This was an appeal under section 32 of the Town and Country Planning Act, 1959. A site had been used for a use within Class V of the Town and Country Planning (Use Classes) Order, 1950, namely, for the reception and preparation of raw materials for the production of foundry and basic pig-iron, for the smelting of raw materials so obtained and for the casting of iron and slag preparatory to marketing. The appellants proposed to use the land for the reception of large quantities of scrap metal. The ferrous scrap was to be separated from any attached foreign elements, such as asbestos lagging, and then graded according to the requirements of customers. The non-ferrous scrap was to be sorted so that the metals and alloys were separated and then packed and dispatched to other customers. Such scrap as was suitable for re-use without any special processing (apart from brushing or scraping) was to be appropriately dealt with. The Minister gave a decision under section 17 of the Act of 1947 that the proposed use would involve development and therefore require permission. The court dismissed the appeal on the ground that the proposed use was not primarily for the recovering of metal from scrap within the meaning of those words in

Class V of the Order but for the recovering of scrap metal. Alternatively, the court held, since Class V was intended to cover processes involving the escape of noxious and offensive gases into the air, the proposed use did not fall within the class because it did not result in any such atmospheric pollution.

R. v. *Chertsey Justices, ex p. Franks* [1961] 2 W.L.R. 442; [1961] 1 All E.R. 825

Offences in respect of enforcement notices—justices' powers.—Where a developer has been previously fined for failing to comply with an enforcement notice section 24 (3) of the Act of 1947 provides: ". . . and if the use is continued after the conviction he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued." Applying this provision justices imposed a fine of £3 per day for the 446 days (£1,338 in all) preceding conviction for continuing to use land as a caravan site contrary to an enforcement notice. The court quashed the conviction on the ground that the offence was a continuing offence which occurred from day to day and the justices were precluded (by section 104 of the Magistrates' Courts Act, 1952) from hearing the information in so far as it alleged an offence committed more than six months before the date of the information. The Divisional Court had no power to amend the fine.

THE LIBRARY

Urban Estate Management. Vol. 2. Rating, Taxation and General Management. Third edition. By W. A. Leach, F.R.I.C.S. The Estates Gazette, Ltd. 1961. xxx, 661 and (index) 15 pp. (£4 7s. 6d.)

It is three years since the third edition of Volume I was published (reviewed in (1958) 22 *Conveyancer* 317) and during that time we have frequently had occasion to refer to it. Mr. Leach is not really writing for the lawyer but he fully understands the lawyer's requirements and accordingly there is full citation of authority and he avoids the vague generalisation. We might first draw attention to Chapter XXIV which deals with property tax in some considerable detail: it is eighty pages long. We cannot think of anywhere else where the subject is dealt with in one piece so fully. There are one or two obscurities. For example, the question whether a landlord or tenant should be assessed where a building is let off in parts is not entirely clear, though this is no doubt largely due to the appalling confusion of the relevant sections; the question whether a premium should be, and is, taken into account in an excess rent assessment is not firmly stated (see pp. 339, 340 and 376), but in fairness it should be said that we have never found a clear statement in any book and even the B.T.R. has published inconsistent views; and the subject of tax allowances for plant and machinery appears to have had the provisions of the Finance Act, 1960, added as an afterthought, giving a distorted picture. Nevertheless, a practitioner, struggling with such subjects as industrial building allowances for the first time, can understand the theory and practice from the author's clear exposition.

On the form of leases and the subject of licences (to assign, sub-let, change use, etc.) there are many useful observations. The author, rightly in our opinion, doubts whether it can be reasonable to require an assignee, still less an underlessee, to enter into a covenant direct with the lessor to pay the rent reserved by the lease, though he makes no observations on the more objectional requirement that a lessor before assignment must offer to surrender the lease to the lessor.

For a general practitioner, the book is worth having merely for the parts mentioned above. For the solicitor who has clients interested in property companies, whether dealing or investment, the book is of even more value, for the author's unrivalled experience in property management makes his observations in the two chapters on the subject invaluable. The disadvantage from which so many solicitors suffer is that, not having a specialist knowledge of property, they do not always fully comprehend the problems they are asked to solve and the standard textbooks and precedent books necessarily lag behind the times to a greater or lesser degree. Mr. Leach's book goes a long way towards covering these gaps.

Finally, we might mention one or two points: the index is inadequate but the table of contents is so full that this is no serious drawback. The author's habit of excessive cross-references often makes the following of some point something like a treasure hunt, but the reader should not be surprised if he gets back where he started. The references to *Estates Gazette* reports may put him onto one or two useful cases that might otherwise be missed. The two volumes together are, no doubt, essential to surveyors and land agents generally, and, at the very lowest, are a very useful addition to any solicitor's library.

E. F. G.

Practical Points on Leases. By W. A. Leach. Sweet & Maxwell, Ltd. 1961. 307 pp. (£2 10s.)

Most property lawyers have had experience of trying to interpret covenants copied straight from the precedents without regard to the particular circumstances of the case. They will be grateful for Mr. W. A. Leach's latest work. His long experience in the Estate Office of a huge property owner has enabled him to provide a wealth of experience of the practical impact of legal phrases, and in the opinion of the reviewer this is by far the best and most useful book Mr. Leach has so far produced. Mr. Leach, despite his wide knowledge of the law, is not a lawyer and, although he specifically disclaims any attempt to instruct lawyers in draftsmanship, most lawyers would do well to consider the points put forward in this book. As is inevitable in a book written by a non-lawyer, the references tend to be to such standard legal textbooks as *Hill* and *Redman*, rather than to the authorities themselves. One could have wished that such references had been extended to the more specialist books on particular aspects of the subject. There is also occasionally a failure to distinguish between the authority of various courts, as for example, a decision *per incuriam* of the Liverpool Court of Passage is given the same sanctity as any of the other and more authoritative cases. Again, as the reports of *De Meza* v. *Ve-Ri-Best Manufacturing Co., Ltd.*, disclose no authorities argued or cited, the case may carry little weight. The section on Fair Wear and Tear should perhaps have referred to *Regis Property Co.* v. *Dudley* rather than to *Brown* v. *Davis*. Some guidance as to the sufficiency of detail required in notices under section 146 of the Law of Property Act might have been welcomed by a practitioner.

In the next edition Mr. Leach will probably correct the obvious oversight on p. 93 where the term "yearly" should have been substituted for "weekly"; and he obviously nodded for a moment when he wrote the footnote on pp. 155–156.

But these are minor criticisms of a well-written (and long-overdue) treatise. Such cases as *Penn* v. *Gatenex Co., Ltd.*, and *Sleafer* v. *Lambeth Borough Council* are warning beacons on the failure to combine legal knowledge with practical experience in drafting leases and letting agreements. This book should do much to bring the two together.

£2 10s. is a high price for a relatively small book, but it is still a good investment.

W. A. W.

The Building Societies Act, 1960. By John Mills, o.b.e., Barrister-at-Law. Stevens & Sons, Ltd. 1961. xx and 242 pp. (£2 10s.)

The completely utilitarian purpose of this book may be inferred without hesitation or error from its title. Its contents really require not review but description. The first eighty-odd pages treat fairly fully in narrative form most but not all of the eleven categories of amendments to building society law made by the 1960 Act. The treatment is explanatory, references being made throughout to the background of superseded statutory and existing case law, but this explanation is only fairly full largely because doubtful points are generally awarded footnote indication rather than textual discussion. Deliberately omitted from detailed treatment as being beyond the scope of the present work are the new provisions relating, for example, to valuation requirements, "special advances," the registrar's powers, and appointment of auditors. The remaining 150-odd pages simply contain three appendices, the first two of which reproduce respectively the Act itself and regulations made thereunder, the third setting out draft rules for a permanent society, all of these being slightly annotated.

From the above the limits of what may be taken to be Mr. Mills' object will have become evident, namely to provide a more than usually detailed handbook on a particular part of building society law for those daily concerned therewith. Indeed, the book is designed as a companion to the wider Wurtzburg's *Building Society Law* replacing the four chapters of the latter work which it covers. This evident object is achieved in a clear and precise manner the narrative part combining well with the appendices to make a useful book. This being so, any criticism to the effect that in places (especially where matters only related to and not being building society law are mentioned, see, *e.g.*, the section on "Incidents of Membership," pp. 66–68) precision tends to become superficiality must be repressed. The utilitarian not to say pedestrian purpose of the publication is to be regarded as well satisfied but no more.

J. T. F.

The Estates Gazette Digest of Land and Property Cases, 1960. Edited by Peter Ash, m.a., Barrister-at-Law. The Estates Gazette, Ltd. 1961. xi, 32 and (index) 4 pp. (£2 5s.)

There was at one time a tendency on the part of the courts to deprecate the citation of *Estates Gazette* reports, but, even apart from the fact that they are now vouched for by a member of the Bar, it is very difficult to ignore their existence and the fact is that they are very well known to members of the estates profession. Over the last few years there has been a steady improvement in the quality of the *Digest*—an ill-chosen and misleading name, for they are reports. The former time-lag has been cut down and the arrangement of the cases improved. The Miscellaneous section has now gone and Agricultural Holdings and Mortgages are given sections on their own.

Certain sections, such as rating, have very much a specialist appeal and that on Estate Agency and Auctioneering is little more than a catalogue of claims for commission, a subject rather boring except to the parties, relieved only slightly by a dispute over cattle dealing and a claim for negligence in which the cynical argument was put forward that "today anybody will buy anything for any price." Other sections have a much more general appeal and, as usual, there are cases reported—for example, *Re Mallows*, on solicitors' undertakings—that are not to be found elsewhere.

As land becomes steadily more in demand, it may be assumed that every kind of dispute relating to it from planning to rescission of contract will become more intense. When the Rent Acts had the appearance of being always with us the *Estates Gazette* reports filled the gaps; now the Acts are going the reports still appear to be carrying out the same functions for other aspects of property law.

E. F. G.

Current Legal Problems 1961. Edited by G. W. Keeton and G. Schwarzenberger. Stevens & Sons, Ltd. 1961. 316 pp. (£3 3s.)

One never quite knows what one will get in the annual publication of public lectures delivered in the Faculty of Laws of University College, London, and the presidential address to the Bentham Club. This volume is not very exciting for conveyancers. Mr. D. W. M. Waters has re-examined the constructive trust which comes into existence on exchange of a contract to sell. He is probably right in suggesting that it assists in no way towards the solution of practical difficulties pending completion and merely effects certain results in the sphere of intestacy and, occasionally, testacy. Mr. E. H. Scamell has reconsidered some aspects of flat schemes and has added his voice to those

—including the chairman of a leading building society—who advocate legislation to make positive covenants run with the land. Mr. Scamell is, of course, aware that Parliament is unlikely to act until potential difficulties have actually grown into manifest injustice. Why must our Parliament lag behind Australia? Mr. Millner's lecture on *apartheid* adds very little to the standard attack on South Africa. The South African case is not put, let alone answered; nor is any indication given how a multi-racial society is to be built up, for no one would seriously suggest that the former colonies further north are now multi-racial. Probably the most interesting lecture is Mr. Hargrove's on "Some Religious Factors in Family and Welfare Law." English law, although its origins are deeply rooted in Christian philosophy, is now, alas, almost pagan. Mr. Hargrove's submission that failure to provide Christian religious instruction (or non-Christian religious instruction where both parents belong to a particular non-Christian faith) to children up to school-leaving age should be deemed to amount to neglect of the children, so that they would be deemed in need of care and protection, is courageous, nor need it be dismissed as impractical. The churches are given ample opportunity of expressing their views on intended legislation, but seem chary of pressing them too strongly.

E. F. G.

An Introduction to Equity. Fifth edition. By G. W. Keeton, M.A., LL.D., Barrister-at-Law. Sir Isaac Pitman & Sons, Ltd. 1961. xlv, 381 and (index) 18 pp. (£2 10s.)

The preface begins with the words: "Since the last edition of this book appeared [1956], there has been an unusually large number of cases raising questions of general equitable principles, which have been noted (and, in respect of the most important of them, discussed) at appropriate places." Although the first part of this statement is quite correct, the second is not. In a short note on the last edition ((1956) 20 *Conveyancer* 515) mention was made of three cases which might well have been noted. Two of these still do not appear and, although it is clear from the table of cases that the *Diplock* case went to the House of Lords, the student might be forgiven if he thought, from the text, that the Court of Appeal's decision was an end of the matter. Equity (without trusts) is not an enormous subject necessitating judicious selection from a mass of recent cases, but it is a subject showing signs of growth and movement. The author ought to take the trouble properly to record this and not give us in 1961 a book ten to twenty years out of date, particularly when the book is written for students who may suffer as a result.

J. H. G.

We have also received:—

The Law of Agency. Second edition. By Raphael Powell, D.C.L., Barrister-at-Law. Sir Isaac Pitman & Sons, Ltd. 1961. liv, 432 and (index) 35 pp. (£3.)—It has always seemed that no-one has been able to expound the law of agency both comprehensively and coherently. Anson's chapter was coherent but not comprehensive. Dr. Powell's book, no doubt, vies for the leading place, but it has a strong academic bias. What other jurisdictions have to say is of great interest, but the practitioner would like to feel that all the English ground has been covered. Alas, he will have to turn elsewhere if he is to be sure that no important English decision has been overlooked. Nevertheless, it must not be supposed that the practitioner has been overlooked. For example, confirming houses are given proper consideration, and the footnotes pursue a number of points into odd corners which may turn out to be of practical importance. There is nothing dry about the author and it is clear that there has been thorough work done on this edition. The index is considerably improved, as is the price.

CORRESPONDENCE

To The Editor,
The Conveyancer and Property Lawyer.

Injurious affection and compensation

Dear Sir,

With regard to Mr. Stern's recent and (if I may say so with respect) arresting article on this subject (Vol. 25, at pp. 223 *et seq.*) I wonder if I may be permitted to offer one or two observations thereon?

Your contributor asks at page 225: "Is there any reason why a person whose house suffers damage should be entitled to compensation if the damage results from excavations made for the construction of a railway, but should be without remedy if similar damage occurs through vibrations caused by passing trains . . . ?" (*Hammersmith Railway* v. *Brand* (1869) L.R. 4 H.L. 171). A possible answer which occurs to the writer is that sections 6 and 16 of the Railways Clauses Act, 1845, limited compensation to that caused by the *construction* of the authorised works.

At pages 227 and 228 your contributor, in dealing with the question of the test for deciding the meaning of a statutory power, draws a distinction between a statute which "defines the particular site on which the undertaking is to operate . . ." and a case "where a public body exercises functions conferred in general terms." It occurs to me however that if the land is acquired pursuant to a Compulsory Purchase Order, can it not be said that Parliament, through the medium of the appropriate confirming Minister, has authorised by way of the confirmed Compulsory Purchase Order the exercise of the appropriate function in respect of the specifically defined site referred to in the Order? In other words, is not the effect of a Compulsory Purchase Order the same as a statute which "defines the particular site on which the undertaking is to operate"?

Finally, I wonder whether your contributor would agree that, notwithstanding the complexity of the matter, there is perhaps a common principle running through the leading cases on the subject? And is that common principle the fact that in considering the compensation provisions (if any) such as section 68 of the Lands Clauses Act, these have to be read with the precise statutory description of the authorised works?

It is true that, in the *Hammersmith* case, the court was not concerned with restrictive covenants nor with section 68 of the Lands Clauses Act, but it would appear that compensation for user of the works was eliminated and compensation was confined to construction on the interpretation of sections 6 and 16 of the Railways Clauses Act, because those sections use only the words "construct" and "construction," respectively.

It would appear also that *Fletcher* v. *Birkenhead Corporation* [1907] 1 K.B. 205 (in which, like the *Hammersmith* case, the court was not concerned with restrictive covenants nor section 68 of the Lands Clauses Act) was distinguished from the *Hammersmith* case because, notwithstanding the heading of the group of sections to which they belong and which refer only to the "construction" of the works, sections 6 and 12 of the Waterworks Clauses Act themselves use the expressions "constructing," "supplying" and "use."

In the Court of Appeal case of *Long Eaton Recreation Grounds* v. *Midland Railway* [1902] 2 K.B. 574, it is not clear why the court was considering

section 68 of the Lands Clauses Act and not the comparable provisions of the Railways Clauses Act. Be that as it may, however, whilst it is understood that the lower court thought that execution of the works, quite apart from their user, amounted to breach of a restrictive covenant, the point, as such, was not raised in the Court of Appeal.

Coming to comparatively more recent times, in *Simeon* v. *Isle of Wight R. D. C.* [1937] Ch. 525, which again involved a restrictive covenant, the Compulsory Purchase Order which incorporated the Lands Clauses Act was apparently made for the purpose of section 51 of the Public Health Act, 1875, which provided that "any urban authority may provide their district . . . with a supply of water . . . for public and private purposes and for those purposes may construct and maintain waterworks. . . ." In this case the court held that the injury to the claimant's estate, *i.e.*, the drawing away of water therefrom, arose from "the execution of the works" within the meaning of section 68 of the Lands Clauses Act since the statutory powers vested in the local authority under section 51 of the Public Health Act authorised the construction and maintenance of waterworks for the supply of water and, in order to supply water, it was necessary to draw water from the land taken to the detriment of the claimant's adjoining land which was not taken. It is true again that in this case the court interpreted the words "execution of the works" used in section 68 of the Lands Clauses Act as wider than "construction of the works" used in section 6 of the Railways Clauses Act and "included the exercise, that is, the carrying out and execution of the appropriate statutory powers." But this may perhaps be regarded as *obiter*. In this connection it is interesting to observe intriguing differences between section 68 and section 63 of the Lands Clauses Act.

As your contributor says, at pages 225 and 226, it is not more than a fair conclusion from the reasoning in *Kirby's* case that it cannot be doubted that whenever the compulsory provisions, and in particular section 68, are incorporated with the special Act, *third persons* suffering damage through the execution of authorised works on land acquired by compulsion or agreement, can claim compensation. But section 68 uses the expression ". . . injuriously affected by the execution of the works. . . ."

In section 63, however (which provides for the compensation to be paid to an *owner* whose lands are compulsorily acquired), the comparable expression is ". . . injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." In other words, in the *Simeon* case the court seems to have inferred that the execution of the works in section 68 meant much the same thing as the much longer and wider expression used in section 63.

This gives rise to the question that, if the court was right, why did not Parliament use the same phraseology for section 68 as for section 63? Could it not be, however, that Parliament had no intention of doing so and deliberately drew a difference so as to narrow the cause for compensation for third parties?

Yours faithfully,

Hove, Sussex. E. J. WILLMOTT.

August 10, 1961.

[Mr. Stern comments as follows:—

"I agree with what Mr. Willmott says in the second paragraph of his letter. but the meaning of my question in its context was not a questioning of the legal position, but of its reasonableness.

"I also agree with the third paragraph of the letter: the exercise of compulsory powers comes within the first limb of the distinction. But since, in the case of a compulsory purchase, section 68 of the Lands Clauses Act provides for compensation of third parties and by implication allows interference with their rights, the question of the extent of a public authority's right to interfere with third party rights arises mainly in cases of purchase by agreement.

"As regards the remainder of Mr. Willmott's letter, I think he is right in saying that the various cases which have occupied the courts must be interpreted with reference to the precise wording of the particular compensation clause applicable thereto."]

PRECEDENTS

FORM 1

Deed of Surrender of an Agricultural Tenancy held under a Long Lease [1]

THIS DEED OF SURRENDER is made the —— day of —— 19— BETWEEN AB of etc. (hereinafter called "the Tenant") of the one part and CD of etc. (hereinafter called "the Landlord") of the other part

WHEREAS:—

(1) By a Lease dated the —— day of —— 19— and made between the Landlord of the one part and the Tenant of the other part the Landlord demised to the Tenant the land therein more particularly described for a term of —— years from the —— day of —— 19—

[1] By s. 3 of the Agricultural Holdings Act, 1948, a tenancy of an agricultural holding for a term of two years or upwards shall, instead of terminating on the expiration of the term for which it was granted, continue as a tenancy from year to year unless terminated by not less than twelve months' notice given by either party to expire on the date fixed for the expiration of the term. Once a period of less than one year remains unexpired, it is clearly impossible for either party to give such a notice since the tenancy has less than twelve months to run. Further, subs. (4) of the section provides that the section shall have effect notwithstanding any agreement to the contrary. In view of these provisions and of the fact that (unlike the position in the case of the somewhat similar provisions of s. 24 of the Landlord and Tenant Act, 1954, which affect business tenancies) no exception is made in favour of termination by surrender, it would seem arguable that the tenancy cannot in the circumstances mentioned, be prevented, in the first instance, from continuing as a tenancy from year to year. The section will have no application, however, to the tenancy from year to year which arises on the expiration of the term once such tenancy has commenced to which other sections of the Act will apply. These other sections do not prevent the surrender of such a tenancy and the present form is intended to provide for a surrender of such yearly tenancy once it has arisen, and at the same time to grant certain rights to the tenant to gather his crops.

(2) The Tenant has agreed with the Landlord to surrender to the Landlord all such interest in the said land as may be vested in him to the intent that the said surrender shall take effect for all the purposes hereof on the date first above mentioned and the Landlord has agreed with the Tenant to grant to the Tenant such rights as are hereinafter mentioned

NOW THIS DEED WITNESSETH AS FOLLOWS:—

1. The Tenant hereby assigns and surrenders unto the Landlord all his interests howsoever arising in the land demised by the said Lease to the intent that the said interests may merge in the Landlord's reversion

2. For the purpose of enabling the Tenant to gather the fruit crop which shall be produced on the said land during the Summer and Autumn of 19— the Landlord hereby grants to the Tenant the right from time to time to enter upon the said land and to take any fruit which shall be growing on the trees thereon but so nevertheless that the following provisions shall have effect in regard thereto:—

(1) The Landlord reserves the right to do or permit to be done on the said land all such acts and things as may be appropriate or desirable in connection with the proposed development thereof [for which planning permission has been obtained] notwithstanding that such acts and things may damage or destroy any of the trees or fruit crop thereon

(2) The rights hereby granted to the Tenant shall not be exercisable after the —— day of —— 19—

(3) If at any time before the arrival of the said date the Landlord shall be desirous of terminating the said rights of the Tenant he shall be entitled to do so upon payment to the Tenant of the sum of £——.

IN WITNESS, *etc.*

FORM 2

Statutory Declaration as to a Lost Land Certificate where the Proprietor has changed its name

(*Drafted by Stephen C. Barker, Solicitor*)

H.M. LAND REGISTRY
LONDON, W.C.2
LAND REGISTRATION ACTS 1925 and 1936
FREEHOLD

County or County Borough .....
Title No. .....
Property .....

[Date] I, —— of —— in the County of —— SOLEMNLY AND SINCERELY DECLARE as follows:—

1. That I am a Director of —— Limited (hereinafter called "the Company") formerly known as —— Limited and which said Company is the Registered Proprietor of the above mentioned title number and I am duly authorised by the Company to make this Statutory Declaration as to loss or destruction of Land Certificate as hereinafter referred to

2. That as such Director of the Company I had at all material times personal knowledge of matters appertaining to the properties of the Company and at all times access to and control of the custody of the documents of title thereto

3. The Company (then known as —— Limited) was registered as Proprietor of the land comprised in the title above referred to with absolute title on the —— day of —— 19—

4. The former name of the Company *viz.* —— Limited as appearing on the Register of Title was by special Resolution passed on the —— day of —— 19— changed to that of —— Limited formal Notice whereof was filed with the Registrar of Companies on the —— day of —— 19—

5. The Company has been in actual possession of the said property from the —— day of —— 19— and no person other than the Company has any interest in the said property or in the Land Certificate of Title thereto and neither is the Company's Land Certificate referred to in any way charged to secure the repayment of moneys or any transaction of that nature

6. The Land Certificate in respect of the said title of the Company was at all times kept with the Company's documents in a Strong Box at the Company's Bankers. No unauthorised person would have had access to the Box and at all times reasonable care was taken of it The most thorough search and inquiry of the Company's records including Deeds with the Company's Bankers and search of any other possible place where the said document might be found have been made but no trace of the same can be found Consequent upon such efforts of mine and under my personal supervision the Company has failed to recover the said Land Certificate or any part or trace thereof and I am left to conclude either that the Company's Land Certificate has become irretrievably lost or has suffered destruction

7. In the foregoing circumstances I hereby apply to the Registrar for the issue of a new Land Certificate on the ground of irretrievable loss or destruction and I hereby undertake as I am authorised for and on behalf of the Company that if the said Land Certificate should be traced the same will be brought into the Registry and meanwhile to indemnify the Chief Land Registrar against any loss which may result from the continued existence of the said Land Certificate

And I make this solemn Declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1835

Declared by the above named ——
at —— in the County of —— this
—— day of —— 19—

Before me, —— a Commissioner for Oaths.

FORM 3

Agreement between two equal shareholders in a company to secure that if one wished to sell his holding he could compel the other to sell at the same time

THIS AGREEMENT under seal is made the —— day of 19— BETWEEN AB of etc. (hereinafter called "Mr. AB") of the one part and CD of etc. (hereinafter called "Mr. CD") of the other part

WHEREAS:—

(1) Each of them Mr. AB and Mr. CD is the registered holder of —— £—— ordinary shares in —— Limited (hereinafter referred to as "the Company") and no more which said shares together represent the whole of the issued share capital of the Company

(2) The total capital of the Company consists of £—— divided into —— preference shares of £—— each and —— ordinary shares of £—— each all of which said capital is save as aforesaid unissued

(3) It is apprehended that the value on sale of the respective shareholdings in the Company of Mr. AB and Mr. CD would or might be dependent upon whether at the time of such sale by one of them of his shares in the Company the prospective purchaser could also purchase the shares in the Company of the other of them

(4) With a view to enabling each of them Mr. AB and Mr. CD to sell his total shareholding for the time being in the Company to the best advantage at such time as he shall think fit Mr. AB and Mr. CD are desirous of entering into this Agreement

Now in pursuance of the said desire and in consideration of the premises THIS DEED WITNESSETH and IT IS HEREBY AGREED AND DECLARED as follows:—

1. If the following conditions shall be satisfied that is to say:—

(1) if Mr. AB shall at any time hereafter be desirous of selling to another person (hereinafter called "the purchaser") all the shares or (as the case may be) the only share in the Company of which Mr. AB shall at that time be the registered holder and

(2) the purchaser being a bona fide purchaser for full money's worth negotiating and dealing at arm's length with Mr. AB shall be desirous of purchasing in addition to Mr. AB's said shares or share all the shares or the only share in the Company of which Mr. CD shall be the registered holder Then and in any such case if Mr. AB shall by a notice in writing addressed to Mr. CD notify Mr. CD that the two conditions last hereinbefore mentioned are satisfied and shall therein give particulars of the name and address of the purchaser and the amount of the proposed purchase price the purchaser shall unless Mr. CD shall on or before the expiration of [14] days from the receipt of such notice cause to be delivered to Mr. AB and leave unrevoked for not less than [14] days an unconditional offer in writing to purchase Mr. AB's said shares or share at the price mentioned in the notice aforesaid on the expiration of the said [14] days have and become entitled to and Mr. CD hereby grants to the purchaser the exclusive option or right at any time within a further period of [14] days (but not afterwards) to purchase all the shares or (as the case may be) the only share in the Company of Mr. CD upon and subject to the following terms and conditions that is to say:—

(i) The price to be paid by the purchaser for the said shares or share of Mr. CD shall be the same as the price to be paid by the purchaser for the corresponding shares or share to be sold by Mr. AB

(ii) The said option shall be exercised (if at all) by the purchaser serving a notice in writing in that behalf on Mr. CD

(iii) In the event of the said option being exercised as aforesaid the purchaser shall within [14] days thereafter pay the full amount of the said purchase price to Mr. CD and Mr. CD

shall thereupon deliver to the purchaser the certificate relating to the said shares or share issued by the Company together with a duly executed transfer of such shares or share

2. If Mr. CD shall at any time hereafter be desirous of selling to another person all the shares or (as the case may be) the only share in the Company of which he shall be the registered holder the provisions contained in clause 1 hereof shall have effect as if the same were repeated in this clause verbatim but with the substitution of references to Mr. CD for references to Mr. AB and of references to Mr. AB for references to Mr. CD

3. Neither Mr. AB nor Mr. CD shall without the consent in writing of the other of them sell transfer or otherwise dispose of the whole or any of his shareholding in the Company for the time being or do or suffer any act or thing in consequence whereof the whole or any part of his said shareholding would or might vest in another person unless such other person shall as part of the same transaction enter into an Agreement under seal with the continuing shareholder or shareholders in the company in the terms of this Agreement or as near thereto as the circumstances may require or permit

IN WITNESS, *etc.*

FORM 4

Legal Charge with provisions for repayment out of rents and profits of mortgaged property

THIS LEGAL CHARGE is made the —— day of 19— BETWEEN AB LIMITED whose registered office is situate at etc. (hereinafter called "the Borrower" which expression where the context so admits shall include the persons deriving title under the Borrower) of the first part CD of etc. a Director of the Borrower and EF of etc. a Director of the Borrower (hereinafter together called "the Sureties") of the second part and GH of etc. (hereinafter called "the Mortgagee" which expression where the context so admits shall include the persons deriving title under the Bank) of the third part

WHEREAS:—

(1) The Borrower is the estate owner in respect of the property particulars whereof are set forth in the First Schedule hereto subject to and with the benefit of the leases and tenancies particulars whereof are set forth in the Second Schedule hereto but otherwise free from incumbrances

(2) The Mortgagee has agreed to advance to the Borrower the sum of £—— upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereinafter appearing

Now in pursuance of the said agreement and in consideration of the sum of £—— now paid by the Mortgagee to the Borrower at the request of the Sureties (the receipt of which sum the Borrower hereby acknowledges) THIS DEED WITNESSETH as follows:—

1. The Borrower and the Sureties hereby jointly and severally covenant with the Mortgagee to pay to the Mortgagee on the —— day of —— 19— the sum of £—— with interest thereon from the date hereof at the rate of £—— per cent. per annum or at such a rate as shall for the time being and from time to time

be equal to one per cent. above the bank rate for the time being and from time to time declared by the Bank of England as the rate of discount allowed on approved bills of exchange And also so long as any principal money shall remain due hereunder after the said —— day of —— 19— to pay to the Mortgagee interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in every year Provided that if and so long as the Borrower or the Sureties shall on or before the —— day of —— and the —— day of —— in every year pay to the Mortgagee whichever shall be the greater of the following two sums that is to say (a) a sum equal to rents profits and income from time to time received by the Borrower and derived after the date hereof by the Borrower from the property hereby charged after deducting therefrom the sum or sums from time to time required to discharge all current rates taxes and outgoings payable by the Borrower in respect of the said property or (b) the sum of £—— the Mortgagee shall accept such payments in discharge firstly of the interest payable hereunder and secondly (as to the balance thereof) in discharge (to the extent of such balance) of the principle money from time to time remaining due hereunder and shall not enforce the covenant for repayment hereinbefore contained

2. The Borrower as beneficial owner hereby charges by way of legal mortgage All That the property mentioned in the First Schedule hereto subject to and with the benefit of the leases and tenancies mentioned in the Second Schedule hereto with the payment to the Mortgagee of all principal money interest and other money payable by the Borrower and the Sureties under this Deed.

3. For the purposes of this charge the legal right of redemption shall cease on the —— day of —— 19— or the date upon which the covenant for repayment hereinbefore contained shall become enforceable by the Mortgagee (whichever shall be the later)

4. The Borrower and the Sureties hereby jointly and

severally covenant with the Mortgagee that at all times during the continuance of this security: —

(1) The Borrower will keep the buildings and premises forming the whole or part of the said property in good repair and insured against loss or damage by fire in the sum of £—— at least and will pay all premiums payable in respect of such insurance within seven days after the same shall have become due and will on demand produce to the Mortgagee the policy of such insurance and the receipt for every premium payable in respect thereof or other sufficient evidence of the subsistence of such policy

(2) The Mortgagee may require money received on any insurance of the said buildings whether effected by the Mortgagee or the Borrower to be applied in or towards making good the loss or damage in respect of which the money is received or in or towards the discharge of any moneys owing hereunder and the Borrower shall hold any money received on such insurance in trust for the Mortgagee to the extent of all such moneys owing hereunder

5. The Borrower hereby covenants with the Mortgagee that during the continuance of this security no person shall without the consent in writing of the Mortgagee be registered as proprietor under the Land Registration Act 1925 of the property hereby charged or of any part thereof

6. Without prejudice to the rights and remedies of the Mortgagee and the enforcement thereof in such order and manner as may be thought proper the property hereby mortgaged by the Borrower shall be and remain charged with and primarily liable for the payment of the principal money and interest and any other money hereby secured in exoneration of the Sureties and their respective estates But as between the Mortgagee on the one hand and the Borrower and the Sureties on the other hand the Sureties shall be deemed principal debtors and not merely sureties and accordingly neither the Sureties nor their respective

estates shall be discharged or affected by any act thing omission or means whatever whereby the liability of the Sureties or their respective estates would not have been discharged if they had been principal debtors

IN WITNESS, *etc.*

THE FIRST SCHEDULE BEFORE REFERRED TO
[*Particulars of the mortgaged property*]

THE SECOND SCHEDULE BEFORE REFERRED TO
[*Particulars of Leases and Tenancies*]

FORM 5

Precedent of Trade Effluent Agreement

Settled by Jack Smith, Esq., LL.B., *Town Clerk of Dunstable: see article, ante*, p. 38

THIS AGREEMENT is made the —— day of —— 19— BETWEEN [*Council*] (who with their successors in title are hereinafter included in the expression [" the Corporation "]) of the one part and [*Company*] (hereinafter included in the expression " the Company ") of the other part

WHEREAS:—

(1) The Company are the owners and occupiers of land in the [Council's District] shown edged [blue] on the plan annexed hereto (hereinafter called " the said plan ") and of the trade premises now or hereafter to be erected on various parts of the said land and used (inter alia) for the purpose of —— shown on the plan within the said land edged [blue] (hereinafter called " the said trade premises ")

(2) Certain of the trade effluent (as hereinafter defined) produced on the said trade premises is now being discharged into the public sewers of the Corporation at the points marked [A] and [B] on the said plan and the Company desire to continue and increase such discharge through the said sewers at the said points [A] and [B]

(3) The Company are desirous that the trade effluent being or to be discharged by them from the said trade premises shall be accepted into the public sewerage system of the Corporation for purification and treatment

(4) The Corporation in lieu of requiring the Company to serve on the Corporation in pursuance of section 2 of the Act of 1937 (as hereinafter defined) a trade effluent notice in respect of any trade effluent from the said trade premises which the Company are desirous of discharging or continuing to discharge into the

public sewers of the Corporation have agreed with the Company that the Corporation will so far as they are lawfully able so to do in pursuance of the provisions of section 7 of the Act of 1937 enter into and carry into effect so far as they are lawfully able so to do an Agreement with the Company for the reception and disposal by the Corporation of trade effluent produced on the said trade premises as hereinafter mentioned upon and subject to the terms and conditions hereinafter appearing

(5) [No interested body within the meaning of the Act of 1937 is affected by this Agreement]

(6) The Company hereby acknowledges that the trade effluent to be discharged from the said trade premises into the sewers of the Corporation will constitute a trade effluent within the meaning of the Act of 1937

(7) The Corporation have submitted to the Ministry of Housing and Local Government for the purposes aforesaid and otherwise sewage and sewerage schemes for the Minister's approval and have also submitted to other bodies and organisations by law concerned for the purposes aforesaid or otherwise plans for their approval to enable the Corporation properly to take and dispose of such trade and domestic effluent and surface water as may be discharged from the said trade premises

(8) The conditions and terms which the Corporation have imposed on the Company lawfully and by agreement are embodied in this Agreement

NOW IT IS HEREBY AGREED by and between the parties hereto as follows:—

1. IN this Agreement unless the context otherwise requires the following expressions shall have and include the meanings hereunto assigned to them that is to say:—

the "Act of 1936" means the Public Health Act, 1936;

the "Act of 1937" means the Public Health (Drainage of Trade Premises) Act, 1937;

"Analyst" means either (i) an independent professional practitioner approved by the Company and appointed from time to time by the Corporation to take samples

and/or analyse samples taken under this Agreement or in default of approval as aforesaid or by mutual arrangement (ii) an authorised officer of the Corporation who is qualified to make an analysis and in accordance with general or particular instructions received from the Corporation from time to time proposes so to do (whether or not he has also taken the sample which he proposes to analyse) and whose qualifications and appointment as analyst the Company approves or in default of such approval or by mutual arrangement (iii) a Public Analyst;

the "approval of the Corporation" means an approval given in writing under the hand of the [Town] Clerk for the time being of the Corporation and expressed to be an approval given for the purposes of this Agreement;

"authorised officer" means any officer of the Corporation authorised in accordance with section 343 of the Act of 1936;

"average concentration" means the concentration ascertained by analysis of a mixture of [eight] samples of equal volume taken at intervals of not less than [one and a half hours] in any day of which [six] samples shall have been taken between the hours of [7 a.m. and midnight] and [two] samples shall have been taken between the hours of [midnight and 7 a.m.];

"Company" shall also include vicariously any officer servant agent licensee independent contractor trespasser or other person (whether lawfully or not) upon the land or upon the said trade premises herein referred to and also any person or persons corporate or unincorporate by operation of law agreement or in any other way exercising or purporting to exercise all or any of the present powers and duties exercised by the Company;

"day" means any period of twenty-four consecutive hours not necessarily running from midnight to midnight;

"drain" means a drain as defined in the Act of 1936 and shall also include any manhole in a drain;

"maximum concentration" means the concentration of constituents ascertained by analysis of a mixture of four samples of equal volume taken in any period of thirty minutes at intervals of ten minutes;

"public sewer" means a public sewer as defined in the Act of 1936 vested by law in the Corporation;

"quarter" means a period of three calendar months ending on the Thirty-first day of March the Thirtieth day of June the Thirtieth day of September or the Thirty-first day of December in each year;

"sewer" shall include any manhole in a sewer;

"trade effluent" means trade effluent as defined in the Act of 1937;

"trade premises" means trade premises as defined in the Act of 1937;

the "sewerage system" of the Corporation shall include not only the Corporation's public sewers and all apparatus and installations connected therewith but also the Sewage Disposal Works of the Corporation and public sewers above and below the same whether or not within the boundaries of the [Corporation's district];

the "successors in title" to the Corporation shall (if appropriate) include any joint Sewerage Authority which may be set up to administer for sewerage purposes the area now administered for this purpose by the Corporation

2. THE Company may subject as herein provided discharge or cause or permit to be discharged from the said trade premises belonging to the Company shown on the said plan into the public [foul] sewers which are shown by red lines on the said plan (hereinafter called "the said public [foul] sewers") trade effluent in quantities and at rates of flow not exceeding those set out in the following table:

Company Drain	*Colour on Plan*	*Maximum Rates of Flow* *Galls. per Hr.*	*Galls. per Day*
That connecting with the public sewer at point [A] on the said plan	Green	* *	* *
That connecting with the public sewer at point [B] on the said plan	Green	* *	* *
Maximum aggregate from points [A & B] not to exceed:		* *	* *

3. THE drains through which trade effluent from the said trade premises shall be discharged into the said public [foul] sewers shall be those shown by green lines on the said plan (hereinafter called "the said trade effluent drains") AND the points of connection between the said trade effluent drains and the said public [foul] sewers shall be those marked [A] and [B] on the said plan

4. THE Company shall not discharge or cause or permit to be discharged from the said trade premises trade effluent at any points other than those marked [A] and [B] on the said plan unless authorised by Clause 5 and/or 6 hereof

5. NOTWITHSTANDING the requirements of the last-preceding Clause the Company may discharge up to —— gallons per hour of clean trade effluent via its internal storm water drains into the Corporation storm water sewers PROVIDED that adequate storm water diversion weirs and/or leap weirs are installed in connection therewith to the satisfaction of the Corporation

6. THE Company shall not be entitled to cause a new and/or enlarged connection to be made with any public sewer if such connection is to be used for the discharge into a public sewer of trade effluent produced on the said trade premises without the prior consent and approval of the Corporation on such terms as shall then be specified

7. THE Company shall before discharging or causing or permitting to be discharged any trade effluent from the said trade premises into the public sewers cause to be eliminated from the

trade effluent all or any of the following substances which may be contained in it if they are present in quantities detectable on analysis by methods conforming to "Recommended Methods for the Analysis of Trade Effluents (1958 Edition)" published by the Society for Analytical Chemistry or by such other methods as may be agreed between the parties in writing in the case of the Corporation under the hand of the [Town] Clerk or in default of agreement in a case to which the "Recommended Methods for the Analysis of Trade Effluents (1958 Edition)" does not apply to be determined by arbitration in accordance with the provisions of this Agreement:— viz.——

8. THE Company shall not discharge or cause or permit to be discharged from the said trade premises a trade effluent containing more than the following amounts of stated matter substance material or thing detectable on analysis by methods specified in the last preceding Clause

Constituent	*Concentration in parts per Million*	
	Maximum Concentration	*Average Concentration*

9. ANY trade effluent discharged or caused or permitted to be discharged from the said trade premises into the public sewers shall not have a temperature higher than —— degrees Fahrenheit at the point of entry into the said sewers namely at points [A] and [B] on the said plan

10. THE Company shall not cause or permit any trade effluent from the said trade premises to be discharged into any public sewer in any manner other than in accordance with the terms of this Agreement AND except to the extent permitted herein the Company shall not cause or permit to pass from the said trade premises into any public sewer any matter substance material or thing in contravention of section 27 of the Act of 1936

11. THE Company shall not discharge or cause or permit to be discharged from the said trade premises into any public sewer a tradè effluent—

(i) of which the pH value of a sample taken in the same

manner as a sample taken for the purposes of determining maximum concentration is at any time less than [6·5] or more than [9·5] except on [Saturdays] when the permitted range shall be from [6·0] to [9·5] on the understanding that it is only washing-down effluent;

(ii) such that the oxygen absorbed by a sample of it in [four] hours from a [N/80] solution of permanganate exceeds [100] parts per million in a shaken sample of the trade effluent or [60] parts per million in a settled sample of the trade effluent

12. Notwithstanding the effect of permissions in other Clauses in this Agreement the Company shall not discharge or cause to be discharged from the said trade premises into the public sewers or elsewhere any of the following things which either of themselves or in juxtaposition association or combination with any other matter substance material or thing with which they are likely to come into contact while passing through the sewerage system do or may have any of the following effects namely:—

(i) any pieces or residues of wool hair oakum rags or similar coarse matter substance material or thing which do or may cause obstruction in incrustation of or other damage to the sewerage system of the Corporation;

(ii) any matter substance material or thing which does or may:—

(a) evolve toxic gases or vapours or produce noxious odours which are or may be harmful to persons working in the sewerage system;

(b) produce inflammable or explosive gases or vapours in the said sewerage system or on contact with the air or other gases;

(c) cause obstruction of or damage to the said sewerage system;

(d) make especially difficult or expensive the treatment and/or disposal of sewage in the sewerage system of the Corporation in which connection the phrase

"especially difficult or expensive" shall bear its ordinary meaning but in so far as there is any disagreement between the parties hereto as to its ordinary meaning the costs of treatment and difficulties of treatment shall be placed before and considered by an Arbitrator appointed under the provisions of this Agreement whose decision hereon shall be binding upon the parties hereto

13. IF on receiving expert technical advice from their consultants the Corporation is satisfied that the Company is committing a breach of any provision of the last preceding Clause numbered 12 then in that case the Corporation may from time to time serve notice on the Company requiring it forthwith to remedy such alleged breach and the Company shall thereupon comply with the requirements of the notice until it is withdrawn or any dispute concerning the notice is settled by arbitration in manner provided under this Agreement PROVIDED THAT if an Arbitrator shall determine that the Company had not committed a breach of the last preceding Clause the notice shall thereupon be of no effect and the Corporation shall indemnify the Company against all loss sustained in consequence of compliance with such notice

14. THE Company shall at their own expense instal maintain in good repair and working order at all times and from time to time replace or renew recording apparatus such as meters or chart recorders or such other apparatus as may be necessary of such a type or types and in such a position or positions as receive the approval of the Corporation from time to time. Such recording apparatus is to be used to ascertain the quantity volume and rate of flow of the trade effluent discharged from the said trade premises and to measure the same separately from the domestic or surface water effluent discharged from the said premises. In so far as any such recording apparatus fails to distinguish and measure the quantity volume and rate of flow of trade effluent separately from domestic and surface water effluent then in that case all the flow of effluent being discharged into the public sewers from the said trade premises shall be deemed to be

trade effluent unless and to the extent only that the contrary is proved by the Company to the reasonable satisfaction and approval of the Corporation

15. IF the Company fails to perform the obligations under Clause 14 then without prejudice thereto the Corporation is hereby authorised on behalf of and at the expense of the Company to undertake the said obligations and to the extent that the Corporation exercise such powers the Company hereby agrees to pay and reimburse to the Corporation such expenses as they incur therein BUT at the absolute discretion of the Corporation experimentally for a period or periods to be determined by the Corporation in lieu of the aforementioned recording devices it shall be open to the Corporation mutually in advance to agree in writing under the hand of the [Town] Clerk for the time being of the Corporation with the Company any alternative method of computation or recording of the flow of trade effluent aforesaid

16. THE result of any analysis of a sample taken by an authorised officer or analyst appointed on behalf of the Corporation shall not be admissible for the purpose of ascertaining whether the conditions of this Agreement are being fulfilled or as evidence in any legal proceedings unless the following requirements have been complied with that is to say :—

(a) each mixed sample shall be not less than three gallons in volume;

(b) the said officer or analyst shall as soon as practicable after taking the sample notify to the Company the intention of the said officer or analyst to have it analysed and shall divide the sample into three equal parts and shall cause each part to be placed in suitable containers each of which shall be sealed up and marked and

(i) shall deliver one part to the Company,

(ii) retain one part for future comparison,

(iii) if he thinks fit to have an analysis made submit one part to himself (if he is a qualified analyst himself within the definition of this Agreement) or to such other

analyst within the definition of this Agreement as the case may be

17. THE Company hereby agrees to notify the Corporation of any material changes in the nature and composition of the trade effluent to be discharged by the Company from the date hereof and to obtain the consent of the Corporation thereto on such terms and conditions as may be mutually agreed between the parties hereto and in the event of disagreement between the parties as to whether there has been any such material change or as to whether such changed effluent can be accepted at all or as to the terms and conditions of such consent the matter shall be referred to arbitration as herein provided

18. WITHOUT prejudice to the powers conferred by section 10 of the Act of 1937 on any authorised officer to enter the said trade premises for the purpose of obtaining and taking away samples of any trade effluent which is passing from those premises into a public sewer the points at which samples shall be taken for the purposes of this Agreement shall be the manholes situate at sampling points [S.A.] and [S.B.] shown in the insets on the said plan and also the manholes situate at discharge points [X] [Y] and [Z] shown in the insets on the said plan

19. THE points at which measurements shall be taken to ascertain the quantity of trade effluent discharged from the said trade premises into the public sewers and hourly and other rates of discharge for the purposes of this Agreement shall be the flow gauging point marked [G.A.] and shown on the said plan and elsewhere as reasonably required by the Corporation. If at any of the said points notwithstanding the provisions of Clause 14 of this Agreement no recording or measuring apparatus is provided as therein mentioned the quantity and rate of flow of trade effluent discharged from the said trade premises into the public sewers shall be determined in such manner as may be mutually agreed between the parties hereto in writing

20. THE Company shall:—

(a) provide and maintain at its own expense and to the satisfaction of the Corporation in a suitable position

an inspection chamber or manhole in connection with each drain or sewer which connects with the public sewers and which discharges or may discharge trade effluent from the said trade premises into a public sewer;

(b) cause every such inspection chamber or manhole to be so constructed and maintained as to enable a person readily to obtain samples of the trade effluent passing from the drains and sewers on the said trade premises into the public sewers and in particular to be fitted with a suitable easy lift cover;

(c) permit so far as such permission may be necessary any authorised officer or analyst appointed by the Corporation at all reasonable times to inspect and test any apparatus or meter for measuring and recording the volume of the trade and other effluent discharged into the public sewers and to take copies of the records of the volume of trade and other effluent so discharged

21. THE Company shall at its own expense and to the satisfaction of the Corporation instal oil interceptors at suitable points before the points of discharge from the trade premises of surface water into the public sewers

22. THE Corporation hereby agrees to keep proper accounts of the cost of construction of the new Sewage Disposal Works and any extensions or alterations thereto or to the existing Sewage Disposal Works and of the costs of construction of any additional or enlarged sewers thereto and also proper accounts of the cost of maintaining the said Works and sewers and the cost of treatment at the said Works and agrees to allow the Company through its duly authorised officers servants or auditors upon notice in writing to the Corporation to inspect such accounts at all reasonable times and to take extracts therefrom for the confidential information of the Company

23. (Submission to Arbitration)

24. THE Company shall be responsible for and shall fully

indemnify the Corporation against all claims damages costs expenses payments and outgoings incurred or suffered by the Corporation and arising out of a failure by the Company fully to observe and perform any of the conditions or provisions of this Agreement

25. (Service of Notices)

26. THIS Agreement shall unless previously determined in accordance with the other provisions hereof remain in force until determined by mutual consent of the parties hereto but if either party wishes to amend the Agreement in any particular then that party shall be at liberty to give to the other party [three months'] notice in writing at any time of the desired amendment and in default of agreement between the parties hereto as to the making and operation of such amendment the matter in dispute may be referred to arbitration in manner provided under this Agreement PROVIDED that Clause 29 of this Agreement may not be referred to an Arbitrator in accordance with the provisions of this Clause

27. IF any of the conditions of this Agreement by the Company to be observed and performed shall not be fully observed and performed the Corporation may (after having given the Company notice of the alleged breach and a reasonable opportunity in the circumstances to remedy the said breach) thereafter determine this Agreement and cut off or disconnect the flow of trade effluent from the trade premises without prejudice to the rights of the Corporation accrued prior to such determination and the right of the Corporation to receive the annual payments mentioned in Clause 29 for the full ten years therein stated

28. THIS Agreement and the benefit thereof is agreed to be personal to the Company and applies only in relation to their land shown edged [blue] on the said plan and the benefit of this Agreement shall not be assignable by the Company or devolved to any other persons or bodies in any other way whether by way of dissolution reconstruction amalgamation liquidation or otherwise EXCEPT THAT if the Company wishes to assign the benefit of this Agreement to another person or body the Corporation will

not refuse to do so if (i) the prospective assignee enters into a new Agreement on terms no less favourable to the Corporation than this Agreement or on such terms as the Corporation thinks fit at the relevant times and (ii) the Corporation is satisfied of the ability of the said assignee to discharge the financial and other obligations of such an Agreement (in particular in relation to a Clause similar to Clause 29 of this Agreement) and (iii) the Corporation is able effectively to treat the effluent proposed to be discharged under such an Agreement by the said assignee

29. (a) The Company hereby agrees with the Corporation to pay to the Corporation in addition to the sums payable under Clause 30 next following for the first [ten] years commencing on [date] the fixed sum of [£——] per annum payable as to instalments of £—— accrued prior to the date hereof on or before the —— day of —— 19— and thereafter [half] yearly on the [thirtieth day of June] and [thirty-first day of December] in each year being at the rate of —— pence per thousand gallons for [quantity] million gallons of trade effluent per annum (irrespective of the quantity of the Company's trade effluent so treated)

(b) And unless waived by the Corporation the said fixed sum shall be paid by the Company for the said [ten] years notwithstanding that the remainder of this Agreement shall have been revoked modified or in any wise altered mutually or otherwise

30. In addition to the sums payable under Clause 29 hereof the Company shall pay to the Corporation :—

(a) for the period from the [date] to the [date] (for the reception into the public sewers of the trade effluent actually discharged from the said trade premises) and for the treatment and disposal thereof the sum of £—— on or before the date of execution of this Agreement

(b) as from the [date] (for the reception into the public sewers of the trade effluent actually discharged from the said trade premises) and for the treatment and disposal thereof in respect of the period ending on the [date] in respect of each subsequent financial year commencing

on the [first day of April] and ending on the [thirty-first day of March] for each [one thousand] gallons actually discharged in each quarter such a sum as may be calculated from the following formula:—

$$A+\left(B\times\frac{M}{DM}\right)=$$ the charge to the Company in pence per thousand gallons actually discharged

For the purposes of the aforesaid formula A represents the cost as determined by the Corporation from time to time in pence to the Corporation in each financial year as aforesaid of their sewerage system (excluding the cost of treatment of sewage at the Sewage Works) per thousand gallons of sewage treated and B represents the cost as determined by the Corporation from time to time in pence to the Corporation in each financial year as aforesaid of treatment of sewage at the Sewage Works per thousand gallons of sewage treated and M represents the McGowan strength of the Company's trade effluent and DM represents the McGowan strength of the sewage for the Corporation's area generally as received at their Sewage Works and the foregoing expression "McGowan strength" is to mean the strength as determined by McGowan's formula:—

McGowan strength = 0·45 (A + B) + 0·65 C

Where A = Nitrogen in free ammonia in parts per million

Where B = 2× Nitrogen in albuminoid ammonia in parts per million

Where C = oxygen absorbed from N/8 permanganate in four hours at 26·7°C in parts per million

and M shall be the average of monthly samples taken at the said trade premises in the manner and at the places provided herein and DM shall be the average of monthly samples taken at the Sewage Works of the Corporation

Average of monthly samples shall be the average of [twelve] samples one sample taken in each calendar month at intervals of not less than [three] weeks and the samples for determining M and DM shall be taken on the same day within one hour of each other between the hours of [9 a.m. and 5 p.m.] and all such

samples shall be taken in the quantities and manner provided by Clause 16 of this Agreement

In the foresaid formula it is hereby mutually agreed that factors A and B shall include only working expenses in respect of repairs renewals and maintenance of mains sewers buildings and plant necessary to enable the sewerage system and the present Sewage Disposal Works of the Corporation to be used and operated to their required efficiency and motive power labour haulage coagulants and other materials and expenses including salaries rates and insurance premiums

The Company shall pay to the Corporation on or before the [first day of February the first day of May the first day of August and the first day of November] in each year the sum of money due to them at the beginning of the preceding month under this Clause in respect of each quarter's actual discharge; and the sums payable under this Clause shall be calculated on an estimate prepared by the [Borough] Treasurer any necessary adjustment being made when the annual accounts are audited which said accounts shall be accepted as final and conclusive for finally determining the sums due under this Clause

31. THE Company also hereby agree to pay the Corporation the cost of up to four analyses per year which the Corporation may take for the purposes of ascertaining whether the conditions of this Agreement are being duly observed and performed PROVIDED that the total cost to the Company per annum shall not exceed £——. The contribution to the cost of such analyses shall be paid within one month of a demand therefor

IN WITNESS, *etc.*

FORM 6

Assignment by Personal Representatives of part of the property comprised in a Lease with provisions for extending the operation of the covenants implied under section 77 (1) (D) (ii) of the Law of Property Act, 1925, but limiting their liability thereunder [1]

(Drafted by J. W. Francis, Solicitor)

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN —— of —— and —— of etc. (hereinafter together called "the Vendors") of the one part and —— of etc. (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) By a Lease (hereinafter referred to as "the said lease") made the —— day of —— 19— between —— of the one part and —— of the other part ALL THAT plot of land situate at —— in the County of —— a plan of which edged red showing the dimensions and contents is drawn thereon was demised to the said —— for the term of —— years from the date thereof at the yearly rent of £—— and subject to the lessee's covenants and the conditions in the said lease reserved and contained.

(2) THE said —— erected or caused to be erected upon the

[1] The practice of extending the operation of s. 77 (1) (D) (ii) in the case of leaseholds, and s. 77 (1) (B) (ii) in the case of freeholds, so as to make Trustees for sale or Personal Representatives personally liable on the covenants on the sale of property at an apportioned rent, appears to be quite common. Under s. 77 of the Law of Property Act the Vendors have power to vary and extend the covenants, but I take the view that s. 77 was very carefully drafted by the late Mr. J. M. Easton, and he obviously took the view that Trustees and Personal Representatives should not be made liable on the covenants, and that the Purchasers were fully protected by the powers given under s. 190 of that Act. Having regard to the seemingly universal practice of expressly incorporating s. 77 of the Law of Property Act, it may now be difficult to persuade Purchasers' Solicitors to accept our contention; nevertheless, I take the view that Personal Representatives should not be made personally liable on the implied covenants, as there may be some difficulty in the winding up of the estate since, for their own protection, they would have to retain a sum of money out of the estate to protect themselves against their personal liability.

land comprised in the said Lease —— messuages or dwelling-houses numbered —— aforesaid.

(3) THE said —— died on the —— day of —— 19— having by his Will dated the —— day of —— appointed the Vendors to be his Executors who on the —— day of —— duly proved the same as the —— Probate Registry.

(4) THE Vendors as such Personal Representatives as aforesaid have agreed with the Purchaser for the sale to him for the sum of £—— of the plot of land and premises hereby assigned (being part of the land demised by the said Lease) subject as is hereinafter mentioned.

(5) THE Vendors hereby declare that they have not given or made any Assent or Assignment in respect of any legal estate in the said property hereby assigned.

NOW THIS DEED WITNESSETH AS FOLLOWS:—

1. IN pursuance of the said agreement and in consideration of £—— on or before the execution of these presents paid by the Purchaser to the Vendors (the receipt of which sum the Vendors hereby acknowledge) the Vendors AS PERSONAL REPRESENTATIVES of the said —— deceased hereby assign unto the Purchaser ALL THAT —— (being part of the land comprised in the said Lease) TOGETHER WITH such rights as the Vendors are able to grant and as are proper for the beneficial enjoyment of the premises hereby assigned in common with the Vendors and others thereto entitled of way over and along any adjoining or neighbouring streets passages or footpaths and of user of sewers drains and watercourses made or to be made in or under any adjoining or neighbouring land now or formerly of the Vendors and any sewers drains or watercourses connecting with the same respectively BUT EXCEPT AND RESERVING to the Vendors like rights in respect of any sewers drains and watercourses made or to be made in or under the land hereby assigned TO HOLD the same unto the Purchaser for all the residue now unexpired of the said term of —— years created by the said Lease SUBJECT to the payment of the yearly rent or sum of £—— as an apportioned part of the before mentioned entire yearly rent of £—— reserved by the said

Lease and to the observance and performance of the lessee's covenants (except the covenant for payment of the said entire yearly rent) and the conditions contained in the said Lease so far as the same are subsisting and enforceable and relate to or affect the property hereby assigned.

2. As between the property hereby assigned and such part of the property comprised in the said Lease as is retained by the Vendors the said entire yearly rent of £—— shall be and the same is hereby apportioned and charged as to the yearly rent or sum of £—— part thereof to and upon the property hereby assigned and as to the yearly rent or sum of £—— residue thereof to and upon such retained property.

3. THE covenants contained in paragraph (i) and (ii) of Part X of the Second Schedule to the Law of Property Act 1925 shall be implied in this Deed with the variations following that is to say:—paragraph (i) shall have effect as if there had been added in the indemnity covenant the words "and the estate and effects of the said —— deceased" and paragraph (ii) shall have effect as if at the end thereof there had been added the words "but so that the Vendors shall be personally liable under such last mentioned covenants during such period and to the extent only that the said retained property shall continue to be retained and held by them."

4. As from the date hereof the property hereby assigned is and shall stand charged with the payment to the Vendors of all moneys which may become payable by the Purchaser and persons deriving title under him under or by virtue of the covenants so implied as aforesaid on his and their part respectively and the said retained property is and shall stand charged with the payment to the Purchaser of all moneys which may become payable to him by the Vendors and persons deriving title under them respectively under or by virtue of the covenants so implied as aforesaid on their part respectively.

5. As between the property hereby assigned and the said retained property all walls and fences separating or dividing the same shall be or be deemed to be party walls and fences and

repairable and maintainable accordingly and (subject as is herein expressly provided) all ways drains lights passages of water or soil or other amenities in the nature of easement shall henceforth continue to subsist and be exercisable or enjoyable as easements in like manner and to the like extent as heretofore under one ownership.

6. The Vendors hereby acknowledge the right of the Purchaser to production and delivery of copies of the said Lease and the Probate of the said Will of the said —— deceased.

7. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £3500.

In Witness whereof the parties hereto have hereunto set their hands and seals the day and year first before written.

FORM 7

Short form of Power of Attorney, operating also under section 25 of the Trustee Act [2]

(Drafted by E. H. Bodkin, of Lincoln's Inn)

THIS POWER OF ATTORNEY is made this —— day of —— by me A of etc.

1. I being about to go abroad with the intention of remaining out of the United Kingdom for a period exceeding one month [from the date of execution hereof] [from the —— day of ——] hereby appoint [B of etc. my attorney] [B of etc. and C. of etc. jointly and each of them severally my attorneys] in my name and on my behalf to do and execute all or any of the acts and things hereinafter mentioned that is to say—

(a) To execute all trusts powers and discretions by any means vested in me as [trustee tenant for life or statutory owner under any instrument or as personal representative of any person] [trustee of a [Trust Instrument] [Will] To execute trusts.

[2] As the power is to operate under s. 25 of the Trustee Act, 1925, a statutory declaration by the principal that he intends to leave the United Kingdom and to remain out of it for a period exceeding one month from the date of execution, or a date mentioned in the power, will be necessary; and the power must be filed at the Central Office, but there is now no time limit for filing—Trustee Act, 1925, s. 25 (2) as amended by Administration of Justice Act, 1956, s. 18. A statutory declaration must be filed with each power; *Practice Direction* [1960] 1 All E.R. 716. If the power relates to registered land or a registered charge it must also be registered at the Land Registry—Trustee Act, 1925, s. 25 (6). A sole co-trustee other than a trust corporation, cannot be appointed—Trustee Act, 1925, s. 25 (1). The execution of the power must be attested by at least one witness, and the execution verified by the affidavit or statutory declaration of the attesting witness, or some other person in whose presence it was executed, or if no such person is available, by some impartial person who knows the signature of the donor, or, if the power was executed abroad, by a notarial Certificate—R.S.C., Ord. 61A, r. 5. As regards any power to dispose of, or deal with, any interest in, or charge on, land, the power, or a certified copy thereof, must be filed at the Central Office unless it relates only to one transaction and is to be handed over on completion thereof—Law of Property Act, 1925, s. 125 (1) as amended by Law of Property (Amendment) Act, 1926, Schedule—and the execution must be verified as above.

[Settlement] [Assent] [Conveyance] dated etc. [tenant for life] [statutory owner] under a Vesting Deed dated etc.] [personal representative of X deceased] and to execute and do all deeds documents acts and things required in such execution or exercise [but so that such trusts powers and discretions shall not be exercised by the survivor of the said B and C.] [3]

To deal with Bank account.

(b) To deposit money in and draw cheques on my current account with the —— Bank [or to deal with my deposit account therewith] and to endorse or sign my name to any cheques dividend or interest warrants or other instruments payable to me.[4]

To give directions to Bank etc.

(c) To give renew or withdraw authorities or directions to the said Bank or other persons or corporations as to the payment of any moneys payable to me.

To recover property.

(d) To demand sue for or prove in any bankruptcy liquidation composition winding up or administration for and receive and give receipts or releases in respect of any money or property now or hereafter belonging or coming to me

To manage land.

(e) To let manage repair and insure all freehold or leasehold property now or hereafter belonging to me [or purchased hereunder] and (without prejudice to the generality of this power) to make arrangements with tenants accept surrenders of leases receive rents and enforce by any means the payment thereof and the performance of the covenants in any lease or tenancy or to sue for and recover damages for the breach thereof [and to apply for the registration of any land and to apply for or consent to any entry or to the modification withdrawal or discharge of any entry on the register in regard to any registered land]

To take proceedings

(f) To take or defend any legal proceedings.

[3] This may be desirable.

[4] In order to prevent the Bank raising any question whether the object of cheques drawn is authorised by the power, it may be better to instruct the Bank to honour all cheques drawn by the attorney.

[(g) To sell any real or leasehold property or interest therein belonging to me or of which I have power to dispose [and any property purchased hereunder] and to raise money by mortgage thereof for any of the purposes hereof] [To sell and mortgage.]

(h) To settle compound submit to arbitration or compromise any accounts disputes claims actions or proceedings [whether or not in respect of my business] and to vary the terms of any mortgage and to pay money due or which may be considered by my [attorney] [attorneys] to be due from me To settle accounts.

[(i) To carry on and manage my business of —— and to enter into contracts respecting the same and raise money therefor and deal with the capital therein and to draw accept endorse negotiate retire pay or satisfy any bills of exchange promissory notes cheques drafts orders for payment or delivery of money securities goods or effects or other negotiable or mercantile instruments or securities and to engage and dismiss clerks or servants] [To carry on business.]

(j) To place on deposit at my said Bank any money received hereunder or to invest the same [in the purchase of or] on the security of freehold or leasehold property or in any investments authorised by law for the investment of trust money and to sell such property or vary such investments and to vote at meetings of companies and otherwise to act as my attorney or proxy in respect of any investment to be so acquired or which I now solely or jointly own [5] To invest.

(k) Generally to act as my [attorney] [attorneys] in relation to the premises and all other matters in which I may be interested and on my behalf to execute and do all instruments acts and things as fully and effectually in all respects as I myself could do Generally to manage affairs.

(l) From time to time to appoint remunerate and remove at pleasure any substitute as attorney or agent but in To appoint substitutes.

[5] As regards stocks transferable at the Bank of England a power in the bank form for receipts of dividends, or request for transmission of dividends to the attorney should be given.

regard to clause (a) hereof only if and so far as authorised by section 25 (9) of the Trustee Act 1925

Provision for death or incapacity of attorney.

2. IN case of the death of the said B or of his becoming unable (whether permanently or temporarily) or refusing to act or becoming bankrupt then I appoint D of etc. to act as my attorney for all the purposes hereof in the place of the said B.

Ratification.

3. I hereby agree to ratify and confirm whatsoever my [attorney] [attorneys] shall do or cause to be done by virtue of this power

Operation of power.

4. THIS power of attorney (except in so far as it operates under section 25 of the Trustee Act 1925) shall be irrevocable for one year from the date hereof and so far as it operates under that section shall not come into force until I leave the United Kingdom and shall be revoked by my return.

IN WITNESS, *etc.*

FORM 8

Conveyance of Freeholds by a Father to his Son on the Son's Marriage [6]

(*Drafted by E. H. Bodkin, of Lincoln's Inn*)

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of etc. (hereinafter called the Father) of the one part and B of etc. (the Son of the Father and hereinafter called the Son) of the other part Parties.

[6] A form of Declaration of Trust of a half share in freeholds for a Son on his marriage was given in Vol. 19 of the *Conveyancer and Property Lawyer* at p. 705. Under the present form the Son will be able to bring the trust for sale to an end and deal with the property as owner on proof of his marriage: see s. 23 of the Law of Property Act, 1925.

Where the whole interest in the property is to be given, it is thought safer to carry out the transaction by means of a trust for sale, rather than to convey the property to the Son absolutely with a provision that the conveyance should be void if the marriage is not solemnised, and to insert a covenant by the Son to re-convey it to the Father in that event, as is sometimes done. If such a course were adopted, questions might be raised by a future purchaser as to whether the transaction created a settlement within s. 1 (1) (ii) of the Settled Land Act, 1925, and that no legal estate passed by reason of non-compliance with the statutory requirements as to the creation of a settlement, or otherwise. It seems clear that a covenant to reconvey would not fall within subs. (1) (ii), on the ground that the disposition over must in order to fall within the subsection arise under a trust, and a covenant does not create a trust; nor is it, *semble*, a disposition in s. 117 (1) (x). On the same ground, a provision for avoiding the Conveyance would not fall within the subsection. Nor would the Father's interest fall within subs. (1) (iii). But it is not clear whether the Son would take a legal estate, as a terminable fee can only now subsist as an equitable interest. The simplest way of carrying out the transaction would be to convey the property to the Son absolutely in consideration of the intended marriage, and to execute the Conveyance as an escrow to take effect on the marriage. But it is preferable to have an express provision that the Father is to become entitled to the property if the marriage is not solemnised within a fixed period, so as to clarify his position if the engagement is long drawn out, or is broken off and renewed—*cf. Bond* v. *Walford* (1886) 32 Ch.D. 238. This is now usually done in marriage settlements where there is a trust for the Settlor until the marriage. Another method of carrying out the transaction would be for the Father to agree prior to the marriage to convey the property to the Son (which agreement would for estate duty purposes require to be strictly proved) and after the marriage to convey the property by a simple conveyance reciting the agreement.

WHEREAS:—

Recitals; title of Father;

(1) The Father is the estate owner in respect of the fee simple free from incumbrances of the property hereinafter described

Intended marriage of Son.

(2) A marriage has been arranged and is intended shortly to be solemnised between the Son and —— and upon the treaty for the said marriage it was agreed that the Father should convey the said property to the Son upon the trusts hereinafter declared

NOW THIS DEED made in pursuance of the said agreement and in consideration of the said intended marriage WITNESSETH and it is hereby agreed and declared as follows:—

Conveyance

1. THE Father AS SETTLOR hereby conveys unto the Son ALL THAT the property described in the Schedule hereto TO HOLD unto the Son in fee simple

Declarations of trust.

2. THE Son hereby declares that he will hold the said property UPON TRUST with the consent of the Father until the solemnisation of the said intended marriage and thereafter at his discretion to sell the same or any part thereof with full power to postpone the sale and will stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits until sale (after payment of all outgoings) IN TRUST for the Father until the solemnisation of the said intended marriage And after the solemnisation thereof IN TRUST for himself the Son absolutely PROVIDED that if the said intended marriage shall not be solemnised within six calendar months from the date hereof the Son shall from and after the expiration of the said period hold the said property (or such part thereof as shall not have been sold under the trust for sale hereinbefore declared) IN TRUST for the Father absolutely

[Clause restricting covenants for title.]

[3. THE covenant which is implied by the Father conveying and being expressed to convey as settlor shall not render him or any person deriving title under him liable to discharge or get in any incumbrance or estate not created by him or any such person]

IN WITNESS, *etc.*

THE SCHEDULE ABOVE REFERRED TO

[This will contain a description of the property conveyed]

FORM 9

Form of Deed of Modification to enable owner of adjoining Freehold land to use Leasehold land as a garden in breach of Covenant to build in Lease. The Lessors not being prepared to sell Freehold reversion but requiring Security for payment of Ground Rent by charge on adjoining Freehold land and property

(*Drafted by Frederick Wm. Kay, Solicitor*)

THIS DEED OF MODIFICATION is made the —— day of —— 19— BETWEEN AB of etc. and CD of etc. hereinafter called "the Lessors") of the one part and EF of etc. (hereinafter called "the Lessee") of the other part SUPPLEMENTAL to a Lease (hereinafter called "the Lease") dated the —— day of —— 19— and made between the Lessors of the one part and [*original lessee*] of the other part

WHEREAS:—

(1) The freehold reversion immediately expectant on the determination of the term of 999 years computed from the —— day of —— 19— created by the Lease is still vested in the Lessors and the plot of land comprised in and demised by the Lease situate at the junction of an intended street with —— Road —— in the County of —— and extending along such intended street —— feet wide and which plot of land with its boundaries abuttals and dimensions is more particularly delineated and described in the plan endorsed on the Lease and therein edged red And also all the estate and interest of the Lessors (if any) in the mines and minerals lying within or under the said thereby demised land except and reserving rights of drainage and otherwise as in the Lease is mentioned is now vested in the Lessee for the residue of the said term of 999 years subject to the payment of the yearly rent of £—— reserved by the Lease and to the covenants on the part of the Lessee and the conditions therein contained

(2) The Lessee is seised for an estate in fee simple of a plot

of land situate on the northeasterly side of the plot of land comprised in and demised by the Lease having a frontage of —— feet to —— Road aforesaid bounded on the easterly side by —— Road aforesaid on the southerly or most southerly side in an irregular line by other land belonging to the Lessee and on the northwesterly side by other land belonging to the Lessee and for the purpose of identification only more particularly delineated and described in the plan endorsed on a Conveyance (hereinafter called "the Conveyance") dated the —— day of —— 19— and made between the Lessors of the one part and [*original grantees*] of the other part and the messuage or bungalow now erected thereon

(3) The Lease contained a covenant on the part of the Lessee therein named that the Lessee would within twelve calendar months from the date thereof erect a detached dwelling-house or bungalow to the satisfaction of the Lessors or their Surveyors and in accordance with plans to be submitted to and approved by the Lessors and throughout the said term thereby created to keep the same and other buildings which might be erected or standing on the demised land with the appurtenances in good and substantial repair order and condition so long as the same would stand and whenever necessary by reason of destruction or decay to rebuild and replace the same with another good and substantial dwelling-house or bungalow to be constructed of good brick or stone or both set with good lime and sand mortar and substantially timbered and covered with good blue slates or tiles so that there might be at all times erected and standing on the demised land a good and substantial dwelling-house or bungalow of the clear yearly letting value of at least £— (such yearly value in case of dispute to be decided by the Surveyor for the time being of the Lessors)

(4) No permanent building in conformity with the said covenant has been erected on the land comprised in the Lease and the Lessee not being desirous of erecting such a building within the time limited by the Lease has requested the Lessors to

modify such covenants in manner hereinafter appearing which the Lessors have agreed to do upon the Lessee agreeing to charge the yearly rent of £—— reserved by the Lease on the adjoining freehold property belonging to the Lessee and comprised in the Conveyance

NOW THIS DEED WITNESSETH as follows:—

1. IN consideration of the premises and of the charge hereinafter contained the Lessors hereby AGREE that so long as the adjoining premises erected on the freehold plot of land comprised in the Conveyance shall be of the clear yearly letting value of £—— at least the Lessee shall not be required to place any permanent building upon the said plot of land comprised in and demised by the Lease and the Lessors will not enforce the covenant in that behalf in the Lease contained PROVIDED ALWAYS that if at any time hereafter during the term granted by the Lease a permanent building in conformity with the said covenant contained in the Lease shall be erected on the land comprised in the Lease then the Lessors will release unto the Lessee the charge hereinafter contained on the freehold land comprised in the Conveyance

2. IN consideration of the modification aforesaid the Lessee hereby DECLARES that the said yearly rent of £—— reserved by the Lease shall be a charge on the plot of land comprised in and conveyed by the Conveyance and on the bungalow and other buildings now erected thereon as well as on the plot of land comprised in the Lease AND the Lessee AS BENEFICIAL OWNER hereby CHARGES the said hereditaments and premises comprised in and conveyed by the Conveyance and the said bungalow erected thereon with the payment to the Lessors of the said yearly rent of £— reserved by the Lease

3. THE Lessee hereby acknowledges the right of the Lessors to production and delivery of copies of the documents specified in the Schedule hereto

IN WITNESS, *etc.*

THE SCHEDULE HEREINBEFORE REFERRED TO

Particulars of documents retained and under which Lessee derives his title to the freehold plot

Signatures and Seals of all parties [7]

[7] Stamp duty 10s. A memorandum of this Deed should be endorsed on the Lease and also on the Conveyance. It is also considered that the document could be registered as a Land Charge Class C (iii) against the freehold land although this may not be strictly necessary, the charge being created by the Deed of Modification which should be executed in duplicate.

FORM 10

Deed of Modification where there has been a breach of covenant to build on leasehold land and charging Ground Rent on adjoining leasehold property the freehold reversions being vested in different owners

(*Drafted by Frederick Wm. Kay, Solicitor*)

THIS DEED OF MODIFICATION is made the —— day of —— 19— BETWEEN AB LIMITED (hereinafter called "the Lessors") of the one part and CH and CW (hereinafter called "the Lessees") of the other part SUPPLEMENTAL to a Lease (hereinafter called "the First Lease") dated etc. (date and parties)

WHEREAS:—

(1) The freehold reversion immediately expectant on the determination of the term of —— years created by the First Lease is now vested in the Lessors

(2) The plot of land comprised in and demised by the First Lease containing —— square yards and shown edged red in the plan endorsed on this Deed is now vested in the Lessees for the residue of the said term and the Lessees are also entitled to the adjoining messuage or dwelling-house and shop situate and being number —— aforesaid shown edged blue in the said plan endorsed hereon for the residue of a term of years from —— created by a Lease (hereinafter called "the Second Lease") dated etc. (date and parties)

(3) The First Lease contained a covenant on the part of the Lessee therein named that the Lessee would within one year from the date thereof erect on the land thereby demised and finish in a workmanlike manner one or more good and substantial dwelling-house or dwelling-houses or other erections or buildings constructed throughout of new materials and built of stone or well burnt bricks or both set with good lime and sand mortar substantially timbered covered with good blue slates flags or tiles and faced with stock bricks or stone parpoints and with

hipped roofs where they abut on any street or road and in the case of a dwelling-house or dwelling-houses with cavity walls outside and which building or buildings when finished should be of the aggregate clear yearly letting value of at least £——

(4) No permanent building in conformity with the said covenant has been erected on the land comprised in the First Lease and the Lessees have requested the Lessors to modify such covenant in manner hereinafter appearing which the Lessors have agreed to do upon the Lessees agreeing to charge the yearly rent of £—— reserved by the First Lease on the adjoining property comprised in the Second Lease and now vested in the Lessees in addition to the yearly rent of £—— reserved by the Second Lease

NOW THIS DEED WITNESSETH as follows: —

1. IN consideration of the premises and of the charge hereinafter contained the Lessors hereby AGREE that so long as the adjoining premises known as —— shall be of the clear yearly letting value of £—— the Lessees shall not be required to place any permanent building upon the said plot of land comprised in and demised by the First Lease and the Lessors will not enforce the covenants in that behalf in the First Lease contained and the Lessors FURTHER AGREE that so long as such premises shall remain of the aforesaid letting value the Lessees may continue to maintain on the land comprised in and demised by the First Lease the present temporary erection and may build or erect any other erection of similar nature and size on any part of such land for use in connection with the trade or business carried on at ——aforesaid but save as is herein contained the said covenants and conditions contained in the First Lease shall remain in full force and effect in all respects as though the same had been contained in a Lease of such land granted at the date of this Deed

2. IN consideration of the modification aforesaid the Lessees hereby DECLARE that the said yearly rent of £—— reserved by the First Lease shall be a Charge upon the plot of land and premises comprised in the Second Lease situate and being number —— aforesaid and shown edged blue in the said plan endorsed on

this Deed as well as on the plot of land comprised in the Second Lease and shown edged red on the said plan endorsed on this Deed and the Lessees AS BENEFICIAL OWNERS hereby CHARGE the said premises number —— aforesaid WITH THE PAYMENT of the said yearly rent of £—— reserved by the First Lease

IN WITNESS, *etc.*

FORM 11

Will of Testator having a Majority Shareholding in Private Company running the Family Business who desires to secure equality amongst his Three Daughters and Son but to allow the Son to control the Business

I AB of etc. hereby revoke all testamentary dispositions heretofore made by me and declare this to be my last Will which I make this —— day of —— 19—

1. I APPOINT CD of etc. and EF of etc. (hereinafter called "my Trustees") to be the executors and trustees of this my Will

2. [*Specific and Pecuniary Legacies*]

3. I BEQUEATH to XY LIMITED whose registered office is situate at —— in the County of —— (hereinafter called "the Company") free of all death duties a sum equal to the amount of all principal money which shall be due and owing to me by the Company at my death under the Company's Loan Account with me together with all arrears of interest (if any) which shall have accrued due thereon to the intent that the indebtedness of the Company under the said Loan Account shall be thereby extinguished

4. I BEQUEATH to my son GH absolutely free of all death duties one quarter in number of the shares in the Company of which I shall be the registered holder at my death PROVIDED that (1) if I shall be entitled at my death to shares in the Company of more than one class or description then I direct that the said bequest shall be satisfied as far as possible out of the ordinary shares in the Company to which I shall be so entitled and if there shall be more than one class thereof proportionately out of each such class and subject thereto and if and so far as may be necessary proportionately out of the other shares in the Company to which I shall be so entitled (2) if the total number of shares in the Company to which I shall be entitled at my death shall not be exactly divisible by four then for the purposes of this bequest

I direct that the said one quarter of the said shares in the Company shall be ascertained by reference to the nearest whole number

5. (1) I BEQUEATH to my Trustees free of all death duties but subject to the option to purchase hereinafter mentioned all the shares of any and every description and class in the Company of which I shall be the registered holder at my death and which shall remain after satisfying the bequest to my son hereinbefore contained Upon Trust as soon as practicable after my death and if and so far as the rights and voting power conferred by the said shares (or any of them) shall entitle them so to do to take all such steps and do all such acts and things as may be requisite to procure the conversion of all the said shares (or so many of them as shall not already comply with the description hereinafter contained) into a similar number of Cumulative Participating Preference shares having attached thereto the rights and privileges following that is to say:—

(a) The holders of the said Preference Shares shall be entitled to receive and be paid out of the profits of the Company a fixed cumulative preferential dividend at such a rate as shall be necessary to secure the payment to the said holders of a sum equal to —— per cent. of the aggregate value at the date of my death of all the shares in the Company of which I shall die possessed and for the purposes hereof the value of the said shares at the date of my death shall be such value as shall be certified in writing by the Company's Auditors PROVIDED that in the event of the said rate of dividend as so ascertained including a fraction other than one quarter, one half or three quarters then in lieu of such fraction there shall be substituted such higher figure or fraction of one quarter, one half or three quarters as shall be the nearest to the said fraction

(b) In the event of the winding up of the Company the holders of the said Preference Shares shall be entitled to have the surplus assets applied first in paying off

the nominal capital of the said shares and secondly in paying off any arrears of the said preferential dividend to the date of commencement of the winding up whether earned or declared or not

(c) The said Preference Shares shall not entitle the holders to receive notice of or attend or vote at any General Meeting of the Company unless:—

(i) at the date of the notice convening the said Meeting the dividend on the said shares or any of them is six months in arrear or

(ii) no dividend or a dividend less than the full amount which might in favourable circumstances be paid in respect of the said shares has been received by the holders thereof in respect of some period for which dividends might be declared or

(iii) the business of the said Meeting includes the consideration of a resolution for reducing the capital by repaying the whole or any part of the capital of the said shares or for the sale of the undertaking of the Company or for altering the objects of the Company or for winding up the Company or any resolution varying or abrogating any of the rights or privileges attached to the said shares

But in any of such cases they shall be entitled to receive notice of and attend the said Meeting and vote thereat either generally or (as the case may require) on any such resolution as aforesaid.

(2) My Trustees shall stand possessed of the said shares when so converted but subject to the like option aforesaid Upon Trust to divide the same into three equal blocks and (subject to the provisions hereinafter contained) to transfer one of such blocks to each of my three daughters IJ KL and MN for her own absolute use and benefit

(3) Subject to the trusts for the conversion of the said shares hereinbefore contained and pending such conversion my Trustees shall stand possessed of the said shares and the income thereof

(a) Upon Trust (if and so far as may be necessary) to exercise the rights and voting power conferred by the said shares (or any of them) so as to secure that an aggregate dividend equal to the total dividend to be paid on the said Cumulative Preference shares shall be received by my Trustees and to pay the said dividend when so received to my said three daughters in equal shares absolutely and subject thereto (b) upon trust for my said son absolutely and so that my Trustees shall exercise the said rights and voting power in such manner as my said son shall from time to time direct

(4) At any time whilst my Trustees shall hold any shares in the Company upon any of the trusts hereinbefore or by sub-clause (6) of this clause mentioned my said son GH shall be entitled to and I hereby bequeath to my said son the exclusive option or right to acquire and take a transfer at one and the same time of all of such shares subject to the following terms and conditions that is to say:—

(a) The purchase price of the said shares (whether they shall be the shares hereinbefore specifically bequeathed to my Trustees or the said Cumulative Preference Shares) shall be the value thereof at the date of service of the notice hereinafter mentioned as certified in writing by the Company's Auditors

(b) The said option shall be exercised (if at all) by my said son serving a notice in writing in that behalf upon my Trustees or any one or more of them signifying his desire to purchase the said shares

(c) Within fourteen days after service of the said notice my said son shall pay to my Trustees the full amount of the said purchase price and my Trustees shall thereupon deliver to my said son the certificate or certificates relating thereto issued by the Company together with a transfer or transfers of such shares duly executed by my Trustees in favour of my said son

(5) My Trustees shall stand possessed of all moneys received by them as the result of the exercise by my said son of the option to purchase hereinbefore mentioned upon trust to pay the same to my said three daughters in equal shares

(6) Notwithstanding any of the trusts hereinbefore contained my Trustees shall not in the execution thereof transfer any share or shares in the Company to any of my said daughters unless at the time of such transfer the transferee shall deliver to my Trustees an Agreement in writing executed by the transferee under seal wherein the transferee shall grant to my said son an option exercisable at any time during his life to purchase the shares comprised in the said transfer upon and subject to the terms and conditions contained in paragraphs (a) (b) and (c) of sub-clause (3) of this clause but with the exclusion of the words in parentheses contained in the said paragraph (a) and the substitution of references to the name of the transferee for references to "my Trustees"

(7) Where in the execution of the trusts hereinbefore contained any share or shares in the Company or any moneys fall to be transferred or paid to any daughter of mine who shall not at the time when any such transfer or payment falls to be made have attained the age of twenty-one years my Trustees shall notwithstanding the said trusts stand possessed of the same upon trust for such daughter or daughters respectively if and when she or they shall respectively attain the age of twenty-one years with full power to vary or invest the same in the manner hereinafter authorised [*add provision for substitution if required*]

6. Subject to the payment of my funeral and testamentary expenses and debts (which I direct may be paid out of the capital of my residuary estate to the exclusion of any income accruing in respect thereof after my death) I DEVISE AND BEQUEATH all the real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of and which I have power to dispose of by Will in any manner I think proper unto my Trustees upon trust to sell the same or so much thereof as shall not consist of money with full power to postpone such sale and to stand possessed of the net proceeds of sale and of the said money and the investments for the time being representing the same and the net rents and profits until sale upon trust for such of my four children hereinbefore mentioned as shall have attained

or shall attain the age of twenty-one years in equal shares absolutely [*add provision for substitution if required*]

7. Money liable to be invested under the trusts of this my Will may be invested or applied in the purchase of or at interest upon the security of such stocks funds shares securities or other investments or property of whatsoever nature and wheresoever (including the purchase of a freehold or leasehold dwelling-house for use as a residence) and whether involving liability or not or upon such personal credit with or without security as my Trustees shall in their absolute discretion think fit

8. Any executor or trustee for the time being hereof may act as an officer or employee of any company shares or debentures of which form the whole or any part of my estate or as an officer or employee of any subsidiary company of any such company and may retain for himself or herself any remuneration which he or she may receive as such officer or employee notwithstanding that any votes or other rights attached to any such shares or debentures may have been instrumental either alone or in conjunction with other matters or by reason of their non-exercise in procuring or continuing for him or her his or her position as such officer or employee or that his or her qualification for any such position may be constituted in part or in whole by the holding of any such shares or debentures

9. Any executor or trustee for the time being hereof being a solicitor accountant or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or proper charges for business transacted time expended and acts done by him or his firm in connection with the trusts hereof including matters which an executor or trustee not being in any profession or business could have done personally

IN WITNESS, *etc.*

FORM 12

I

Conveyance to Trustees for sale by owners of separate plots of freehold land to enable negotiations for sale to a local authority to be conducted in respect of the entirety as one plot [1]

(Drafted by W. G. H. Cook, of Lincoln's Inn)

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of —— (hereinafter called "Mr. A") of the first part B of —— (hereinafter called "Mr. B") of the second part C of —— (hereinafter called "Mr. C") of the third part and Mr. A Mr. B and Mr. C (hereinafter together referred to as "the Trustees") of the fourth part

WHEREAS:—

Recitals: Title to yellow land;

(A) Mr. A is the beneficial owner in respect of the fee simple of the property coloured yellow on the plan annexed hereto (hereinafter referred to as "the yellow land") absolutely free from incumbrances

Title to blue land;

(B) Mr. B is the beneficial owner in respect of the fee simple of the property coloured blue on the said plan (hereinafter referred to as "the blue land") absolutely free from incumbrances

Title to pink land;

(C) Mr. C is the beneficial owner in respect of the fee

[1] This form and the next following form are designed to meet the case where two or more owners of small plots of land desire to act together in connection with the compulsory acquisition of all the plots owned by them with the view of obtaining the highest possible price for the several plots. It is considered that the conveyance would be sufficiently stamped with a deed stamp of ten shillings on the footing that the same falls under the following heading in the Schedule to the Stamp Act, 1891, *viz.*, "Conveyance or Transfer of any Kind not hereinbefore described," *viz.*, not on sale, nor by way of security, nor as a voluntary conveyance, nor a conveyance under which a beneficial interest passes in the property conveyed (see Finance (1909–10) Act, 1910, s. 74 (*b*) and *Sergeant on Stamp Duties*, 3rd ed., p. 94).

It is also considered that the stamp on the settlement could not on any view exceed *ad valorem* duty of five shillings per £100 on the total value of the property (see Sergeant (*op. cit.*), p. 175).

simple of the property coloured pink on the said plan (hereinafter referred to as "the pink land") absolutely but subject to a mortgage in favour of D but otherwise free from incumbrances

Desire to convey to Trustees.

(D) With the object of facilitating negotiations with the acquiring authority the parties hereto are desirous that the legal estate in respect of the entirety of the above-mentioned land shall be vested in the Trustees and it has been agreed to execute this Conveyance accordingly.

NOW THIS DEED made in pursuance of the said agreement WITNESSETH AND IT IS HEREBY AGREED AND DECLARED as follows:—

Conveyance.

1. (A) Mr. A as beneficial owner hereby conveys unto the Trustees ALL THAT the yellow land

(B) Mr. B as beneficial owner hereby conveys unto the Trustees ALL THAT the blue land

(C) Mr. C as beneficial owner hereby conveys unto the Trustees ALL THAT the pink land (subject to the recited mortgage)

TO HOLD all the property hereby conveyed unto the Trustees as joint tenants in fee simple upon trust to sell the same with power to postpone the sale thereof

Trust of proceeds of sale.

2. The Trustees shall hold the net proceeds of sale after payment of costs and the net rents and profits until sale after payment of outgoings Upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in a Settlement already prepared and intended to bear even date herewith and to be made between the same persons as those who are parties hereto and in the same order

Power of appointing new trustees.

3. The statutory power of appointing new trustees is applicable hereto

IN WITNESS, *etc.*

II

Settlement of proceeds of sale of the property comprised in the preceding form [2]

(Drafted by W. G. H. Cook, of Lincoln's Inn)

Parties.

THIS SETTLEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "Mr. A") of the first part B of *etc.* (hereinafter called "Mr. B") of the second part C of *etc.* (hereinafter called "Mr. C") of the third part and Mr. A Mr. B and Mr. C (hereinafter together referred to as "the Trustees" of the fourth part

Recital of Conveyance of even date.

WHEREAS by a Conveyance of even date herewith and made between the parties hereto the freehold property more particularly delineated on the plan hereto annexed and thereon coloured yellow blue and pink was conveyed to the Trustees upon trust for sale as mentioned in the said Conveyance and to hold the net proceeds of sale thereof and the net rents and profits thereof until sale upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in the Settlement therein mentioned being this Settlement

NOW THIS DEED made in consideration of the premises WITNESSETH AND IT IS HEREBY DECLARED as follows:—

Trusts of proceeds of sale in proportion to respective values.

1. The Trustees shall hold the net proceeds of sale of the said property upon trust as to 8/14th equal parts for Mr. A absolutely and as to 5/14th equal parts thereof for Mr. B absolutely and as to the remaining equal fourteenth part thereof for Mr. C and his mortgagee (according to their respective interests) absolutely

Trust pending sale.

2. Pending the sale of the entirety of the said property the Trustees shall hold the property coloured yellow on the said plan and the net rents and profits thereof until sale upon trust for

[2] See notes to preceding form.

Mr. A absolutely and the property coloured blue on the said plan and the net rents and profits thereof until sale upon trust for Mr. B absolutely and the property coloured pink on the said plan and the net rents and profits thereof until sale (subject to the subsisting mortgage) upon trust for Mr. C absolutely

3. The statutory power of appointing new trustees is applicable hereto

Power of appointing new trustees.

IN WITNESS, *etc.*

FORM 13

Agreement for the sale of turves on land with the right to cut and remove them, with option to re-cut [1]

(Drafted by E. H. Bodkin, of Lincoln's Inn)

Parties. AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Vendor) of the one part and B of *etc.* (hereinafter called the Purchaser) of the other part

Agreement for sale. 1. The Vendor agrees to sell and the Purchaser agrees to purchase ALL THOSE the turves lying in or upon the land (hereinafter called the said land) situate at —— in the County of —— more particularly delineated on the plan hereto annexed and thereon coloured —— TOGETHER WITH the right to enter upon the said land for the purpose of digging cutting and removing the said turves

Title not to be investigated. 2. The Vendor shall not be required to show or furnish any title or evidence of title to the said land

Purchase-money. 3. The purchase-money shall be £— (being a sum calculated at the rate of —— pence per square yard) on —— square yards (the estimated area of the said land) and shall be paid on the —— day of —— next and time shall be of the essence of this provision nor shall the Purchaser have any right to enter upon the said land until the said purchase-money shall have been paid

[Sale to be subject to leases.] [4. The sale is subject to the leases and tenancies of the said land or any part thereof whether now or hereafter to be granted] [2]

[1] The agreement is intended to be used on the sale of "sea-washed turf" which is extensively used for bowling greens. The method of cultivation varies, and in some cases natural re-sowing only is allowed.

The agreement is framed as an agreement for the sale of the turves (which are part of the land) together with the right of entry and removal. The agreement should be registered as an estate contract. The stamp duty will be sixpence.

[2] It is assumed that the leases and tenancies contain a reservation of the right of turbary, as, if they do not, the tenants might have a right to restrain the cutting by injunction and cl. 5 might not adequately protect the vendor.

[5. The Purchasers shall indemnify the Vendor against all actions proceedings costs charges claims and demands brought or claimed against the Vendor in respect of interference with the rights of or damage to the property of any present or future lessee or tenant of the said land or any part thereof or any other person occasioned by the digging cutting and removal of the said turves] [Indemnity against lessee's claim.]

6. The turves in or upon the whole of the said land shall be dug or cut and removed within the period of five years from the date hereof [but no turves other than the turves in or upon not more than one fifth of the said land shall be dug or cut in any one year without the previous consent in writing of the Vendor or his agent whose decision as to the extent of the portion of the said land so dug or cut shall be conclusive and binding on the parties] Period of cutting.

7. The said turves shall be stacked on the said land and shall be removed only along roads or tracks approved by the Vendor or his agent and in digging cutting and removing the said turves the Purchaser shall do as little damage as possible and shall forthwith make good all damage Removal of turves.

8. The Purchaser shall not (notwithstanding anything herein contained) damage or obstruct any roads or tracks used by the Vendor or other persons nor shall he damage the fences hedges or gates Purchaser not to damage or obstruct roads, etc.

9. The Purchaser shall re-sow the whole area on which the said turves have been dug or cut at his own expense with red fescue within the period of six years from the date hereof but the Purchaser shall not make any sowing until the seeds and proposed method of sowing and preparation of the ground shall have been approved by the Vendor or his agent Re-sowing.

10. (1) The Purchaser shall have the option upon giving one calendar month's previous notice in writing to the Vendor expiring before the —— day of —— 19— to dig cut and remove the new turves on the said land on the same terms and conditions (*mutatis mutandis*) as are herein contained in relation to the original period of five years except (a) that the purchase- Option for new cutting.

money shall be paid on the expiration of one calendar month from the commencement of the period mentioned in the next following sub-clause and (b) that the whole of the said land shall be re-sown within one year from the expiration of the new period of five years and (c) that the Purchaser shall have no further option to dig or cut any new turves on the said land

(2) The period of five years within which the new turves on the said land are to be dug cut and removed shall commence on the expiration of —— calendar months after the date (being a date after the expiration of the original period of five years) on which the whole of the said land has been re-sown in accordance with the provisions hereof PROVIDED that if there shall be any subsisting breach of the terms and conditions of this Agreement before the right so to dig or cut becomes exercisable this option shall be null and void

[Alternative form of option.]

[10. The purchaser shall have the option on giving in each case one calendar month's previous notice in writing to the Vendor to dig cut and remove the new turves on any portion of the said land which has been re-sown in accordance with the terms hereof —— years previously to the date of expiration of such notice (which date of expiration is hereinafter called the said date) such digging cutting and removal to commence on the said date and to be completed within one year from the said date and to be made on the same terms and conditions (*mutatis mutandis*) as are herein contained in relation to the original digging cutting and removal and otherwise except that (a) the purchase-money shall in each case be one fifth (or a proportionate part of the said purchase-money of £— to be determined by the Vendor's agent (whose decision shall be final and binding on the parties) and shall be paid on the expiration of one calendar month from the said date (b) that the Purchaser shall re-sow such part in accordance with the terms hereof within one year from the completion of such digging or cutting and (c) that the Purchaser shall have no further option to dig or cut any new turves thereon PROVIDED that if there shall be any subsisting breach of the terms and conditions hereof on the said date this option shall be null and void]

Power to determine.

11. If the Purchaser shall fail to pay the respective amounts of purchase-money hereinbefore mentioned or any of them on the dates hereinbefore mentioned the Vendor may by notice in writing determine this Agreement and any option thereunder (whether exercised or not) without prejudice to any accrued right of the Vendor under this Agreement

Purchaser not to assign Agreement.

12. The Purchaser shall not assign or sub-let the benefit of this Agreement or the option [any of the options] herein contained or any part thereof respectively without the consent in writing of the Vendor

AS WITNESS, *etc.*

FORM 14

Settlement by way of trust for sale of a house by a widower proposing to re-marry with a view to retaining enjoyment of the house or its proceeds but avoiding the possible application thereto of the Inheritance (Family Provision) Act, 1938, (as amended) on his death

I Conveyance on Trust for Sale

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Settlor") of the one part and the Settlor and CD of *etc.* (hereinafter together called "the Trustees" which expression shall where the context so admits include the survivor of them or other the trustees or trustee for the time being hereof) of the other part

WHEREAS: the Settlor is the estate owner in respect of the fee simple of the property described in Part I of the Schedule hereto (hereinafter called "the said property") subject to a Mortgage short particulars whereof are set forth in Part II of the said Schedule but otherwise free from incumbrances and is desirous of conveying the same upon the trusts and subject to the powers and provisions hereinafter contained or referred to

NOW in pursuance of the said desire THIS DEED WITNESSETH as follows:—

1. The Settlor hereby conveys unto the Trustees ALL THAT the said property TO HOLD the same unto the Trustees in fee simple Upon Trust during the lifetime of the Settlor with his consent in writing and after his death at their discretion to sell the same or any part thereof with full power unless and until the Settlor shall request them to sell to postpone such sale and to stand possessed of the net proceeds of sale (after payment of costs and expenses) and of the net rents and profits until sale (after payment of outgoings) upon the trusts declared concerning the same by a Settlement already prepared and intended to be executed contemporaneously herewith and made by and

between the same persons who are parties hereto and in the same order

2. Pending the sale of the whole of the property hereby conveyed pursuant to the trust for sale hereinbefore declared the Trustees shall during the lifetime of the Settlor with his consent in writing and thereafter for a period of 21 years at their discretion have the same full and unrestricted power of mortgaging or charging the same or any part thereof for any purpose and in any manner in all respects as they shall in their absolute discretion think fit

3. During the lifetime of the Settlor the power of appointing a new trustee or new trustees hereof shall be vested in the Settlor and subject thereto the statutory power to appoint trustees shall be applicable hereto

4. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the value or aggregate value of the property conveyed or transferred exceeds the sum of £—

IN WITNESS, *etc.*

THE SCHEDULE BEFORE REFERRED TO

Part I

Part II

II Settlement to accompany preceding form

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Settlor") of the one part and the Settlor and CD of *etc.* (hereinafter together called "the Trustees") of the other part

WHEREAS:—

(1) By a Conveyance (hereinafter called "the Conveyance") bearing even date herewith and made by and between the same

parties who are parties hereto and in the same order the property therein described was conveyed to the Trustees in fee simple but subject as in the Conveyance mentioned Upon Trust to sell the same or any part thereof with such power to postpone such sale as is therein more particularly mentioned And to stand possessed of the net proceeds of any such sale after payment of costs and of the net rents and profits until sale upon the trusts declared concerning the same by a Settlement of even date therewith (being this Settlement)

(2) It is anticipated that the Settlor may hereafter cause to be paid or transferred to the Trustees or that the Trustees may otherwise receive further property moneys or investments to be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained

Now in consideration of the premises THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

1. In this Settlement the following expressions shall unless the context otherwise requires have the following meanings respectively that is to say:—

(1) "the Trustees" shall mean the Trustees and the survivor of them or other the trustees or trustee for the time being hereof

(2) "the Trust Fund" shall mean the net moneys to arise from any sale made under the trust for sale contained in the Conveyance and all property moneys and investments transferred or paid to and accepted by the Trustees upon the trusts and with and subject to the powers and provisions of this Settlement and the moneys investments and property from time to time and for the time being representing the same

(3) "the House" shall mean the property conveyed to the Trustees by the Conveyance and any other dwelling-house for the time being representing the Trust Fund or any part thereof

2. The Trustees shall stand possessed of the Trust Fund upon trust either to retain the same in the form of the moneys investments and property for the time being constituting the Trust Fund or at any time or times and from time to time at their discretion to apply and or realise and vary the said moneys investments and property in the manner hereby authorised

3. Without prejudice to the trust for sale contained in the Conveyance and the immediate binding nature thereof it is hereby declared that the Trustees shall pending a sale of the House and so far as practicable permit the Settlor to reside during his life in the House

4. The Trustees shall receive and stand possessed of the income of the Trust Fund and the net rents and profits of the House until sale upon trust to pay the same to the Settlor during his life and subject thereto the Trustees shall stand possessed of the capital and income of the Trust Fund and of the House and the net rents and profits thereof until sale upon trust for the Settlor's daughter EF absolutely

5. Notwithstanding the trusts powers and provisions hereinbefore declared and contained of and concerning the Trust Fund and the House and the income and net rents and profits thereof respectively the Trustees shall have full power in their absolute discretion at any time or times and from time to time to raise the whole or any part or parts of the capital of the Trust Fund and pay or apply the same in their absolute discretion to or for the benefit of the Settlor

6. Moneys falling to be invested under the trusts and provisions hereof may be invested or applied in the purchase of or at interest upon the security of such stocks funds securities or other investments or property of whatever nature and wheresoever situate (including the purchase and also the application of moneys for the improvement or repair of a freehold or leasehold dwelling-house for use as a residence) and whether involving liability or not or upon such personal credit with or without security as the Trustees shall in their absolute discretion think fit and it is hereby declared (without prejudice to the generality of the foregoing) that the Trustees shall have full power (1) to apply such moneys in discharging any mortgage to which any property vested in them upon the trusts hereof (or of the Conveyance) may from time to time be subject and (2) to lend such moneys to the Settlor upon such terms as to the repayment of the capital and the payment of interest (if any) and otherwise as the Trustees shall in their absolute discretion think fit and for

the purposes of exercising the said power of lending the Trustees may raise any moneys so required by a sale mortgage or other disposition of the Trust Fund or (subject to the provisions of the Conveyance) of the House or any part or parts thereof respectively

7. During the lifetime of the Settlor the power of appointing a new trustee or new trustees hereof shall be vested in the Settlor and subject thereto the statutory power to appoint trustees shall be applicable hereto

8. Any trustee for the time being hereof being a solicitor accountant or other person engaged in any profession or business shall be entitled to charge retain and be paid all usual professional or proper charges for business transacted time expended and acts done by him or his firm in connection with the trusts hereof including matters which might or should have been attended to in person by a trustee not being a solicitor accountant or other person so engaged

9. Notwithstanding any conflict of interest or duty which may arise in connection with the exercise of any of the trusts powers or discretions herein contained it is hereby declared that so long as the Settlor shall be a trustee hereof (and whether alone or with any other or others) the said trusts powers and discretions shall be exercisable by the Trustees including the Settlor

In witness, *etc.*

FORM 15

Assignment of lease charged with (or exonerated from) the entire rent with provisions extending the covenants implied under section 77 (2) of the Law of Property Act, 1925 [1]

(Drafted by J. W. Francis, Solicitor)

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Vendor") of the one part and CD of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) By a Lease (hereinafter referred to as "the said Lease") made the —— day of —— 19— between —— of the one part and —— of the other part ALL THAT plot of land situate at —— in the County of —— a plan of which edged red showing the dimensions and contents is drawn thereon was demised to the said —— for the term of —— years from the date thereof at the yearly rent of £— and subject to the lessee's covenants and the conditions by and in the said Lease reserved and contained

(2) The Vendor has agreed with the Purchaser for the sale to

[1] This Form is intended to overcome defects from which s. 77 (2) of the Law of Property Act, 1925, appears to suffer.

If land is conveyed or assigned subject to or charged with the payment of the entire rent reserved by a lease, then para. (*d*) (i) of s. 77 (1) of the Law of Property Act, 1925, has effect as stated in s. 77 (2) of the Law of Property Act, 1925, but it is noted that the last-mentioned section does not imply covenants similar to the corresponding covenants under para. (*d*) (ii) of s. 77 (1) of the Law of Property Act. It would appear that the covenants under s. 77 (1) (*d*) (ii) of the Law of Property Act, 1925, would not be implied in such a case, since the covenants under that section are only to be implied where land is sold subject to part of a rent; and certainly no such covenants are implied under s. 77 (2) of the Law of Property Act, 1925. It would follow therefore, assuming this to be right in law, that if parties to a deed rely on s. 77 (2) then the purchaser would be without implied covenants from the vendor. Similarly, where land is conveyed or assigned, discharged or exonerated from rent, then the vendor is without implied covenants from the purchaser.

Mr. H. C. Easton takes the same view in his *Precedents in Rent Charge Conveyancing.*

him of the plot of land and premises hereinafter described and hereby assigned (being part of the larger plot of land comprised in the said Lease) [subject to and charged with] [discharged and exonerated from] the payment of the said entire yearly rent reserved by the said Lease and subject as is hereinafter mentioned but otherwise free from incumbrances at the price of £—

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £— now paid by the Purchaser to the Vendor (the receipt of which sum the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby assigns unto the Purchaser ALL THAT —— (being part of the larger plot of land comprised in the said Lease) TO HOLD the same unto the Purchaser for all the residue now unexpired of the said term of Nine hundred and ninety-nine years granted therein by the said Lease [SUBJECT to and CHARGED WITH] [DISCHARGED and EXONERATED FROM] the payment as from the date hereof of the said entire yearly rent of £— reserved by the said Lease [and] [but] SUBJECT to the observance and performance of the lessee's covenants ([including] [other than] the covenant for payment of the said entire yearly rent) and the conditions contained in the said Lease so far as the same are subsisting and enforceable and relate to the premises hereby assigned

2. IT IS HEREBY AGREED AND DECLARED by and between the parties hereto as follows:—

(a) The said entire yearly rent of £— reserved by the said Lease shall as from the date hereof be and the same is hereby charged exclusively upon the plot of land and premises hereby assigned in exoneration of such part of the premises comprised in the said Lease as is not hereby assigned

(a) The said entire yearly rent of £— reserved by the said Lease shall as from the date hereof be and the same is hereby charged exclusively on such part of the plot of land and premises comprised in the said Lease as is not hereby assigned in exoneration of the premises hereby assigned

This clause will be used where the rent is

(b) The covenants referred to in paragraphs (*d*) (i) and (*d*) (ii) of subsection (1) of section 77 of the Law of Property Act 1925

shall be implied in this Deed with the following variations namely:—paragraph (*d*) (i) shall have effect as if the entire rent were the apportioned rent and the words "other than the covenant to pay the entire rent" had been omitted and paragraph (*d*) (ii) shall have effect as if the words "pay the balance of the rent after deducting the apportioned rent aforesaid and any other rents similarly apportioned in respect of the land not retained" had been omitted

charged on the land assigned.

(b) In addition to the covenants referred to in section 77 (2) (ii) of the Law of Property Act 1925 there shall also be implied in this Deed the covenants referred to in section 77 (1) (*d*) (i) of that Act but so that such last-mentioned covenants shall have effect as if the words "pay the apportioned rent" had been omitted

This clause will be used where the land assigned is discharged and exonerated from the rent.

3. As from the date hereof the property hereby assigned is and shall stand charged with the payment to the Vendor of all moneys which may become payable by the Purchaser and persons deriving title under him under or by virtue of the covenants so implied as aforesaid on his and their part respectively and the said retained property is and shall stand charged with the payment to the Purchaser of all moneys which may become payable to him by the Vendor and persons deriving title under him or them respectively under or by virtue of the covenants so implied as aforesaid on his and their part respectively

4. As between the property hereby assigned and the said retained property all walls and fences separating or dividing the same shall be or be deemed to be party walls and fences and repairable and maintainable accordingly and (subject as is herein expressly provided) all ways drains lights passages of water or soil or other amenities in the nature of easements shall henceforth continue to subsist and be exercisable or enjoyable as easements in like manner and to the like extent as heretofore under one ownership

5. The Vendor hereby acknowledges the right of the Purchaser to production and delivery of copies of the said Lease and hereby undertakes with the Purchaser for the safe custody thereof

6. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £—

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written

FORM 16

Transfer and trust deed for the benefit of an infant [1]

I

Transfer

H.M. LAND REGISTRY
LAND REGISTRATION ACTS 1925 and 1936

County:

Parish or Place:

Property:

Title No.:

1. In consideration of the execution by AB of *etc.* (hereinafter called "the Purchaser") of a Legal Charge of even date herewith to secure the payment to CD of *etc.* (hereinafter called "the Vendor") of the sum of £— in the manner therein provided the Vendor as beneficial owner hereby transfers to the Purchaser the land comprised in the title above referred to

2. The Purchaser shall hold the property hereby transferred upon trust to sell the same with full power to postpone such sale and to stand possessed of the net proceeds of sale and of the net rents and profits until sale upon the trusts declared by a Trust Deed of even date and intended to be executed contemporaneously herewith

[3. CERTIFICATE AS TO VALUE IF REQUIRED]

[USUAL ATTESTATION, *etc.*]

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[1] These forms are intended to provide for the case of an infant who desires to purchase business premises or a house upon mortgage but who, by reason of his infancy, has to procure the legal estate to be vested in a person of full age pending the attainment by the infant of his majority.

II

Trust Deed to accompany preceding form

THIS TRUST DEED is made the —— day of —— 19— BY AB of *etc.* (hereinafter called "the Trustee")

WHEREAS:—

(1) By a transfer of even date and intended to be executed contemporaneously herewith the property more particularly referred to therein (hereinafter called "the Property") was transferred to the Trustee

(2) By a Legal Charge also of even date and intended to be executed contemporaneously herewith the Trustee charged the Property with the payment to CD (hereinafter called "the Mortgagee") of the sum of £— by the instalments and in the manner therein more particularly provided

(3) The Trustee has an infant son namely EF (hereinafter called "the Beneficiary") who was born on the —— day of —— 19—

(4) The Trustee is desirous of declaring such trusts of and concerning the Property for the benefit of the Beneficiary as are hereinafter contained

NOW THIS DEED WITNESSETH as follows:—

1. The Trustee shall hold the Property upon trust to sell the same with full power at his discretion to postpone such sale and shall stand possessed of the net proceeds of sale and the net rents and profits until sale upon and subject to the following trusts and provisions

2. Pending the attainment by the Beneficiary of the age of 21 years and so long as the Property or any part thereof shall remain unsold the Trustee shall apply the net rents and profits thereof as follows that is to say

(1) In discharging all moneys from time to time falling to be paid under the said Legal Charge and subject thereto

(2) For the maintenance and benefit of the Beneficiary

3. Subject as aforesaid the Trustee shall stand possessed of

the net proceeds of sale and the net rents and profits of the Property until sale upon trust for the Beneficiary absolutely

4. On the attainment by the Beneficiary of the age of 21 years the Trustee may and on being required by the Beneficiary so to do shall transfer the Property into the name of the Beneficiary freed and discharged from the trusts hereof but as a condition of such transfer the Trustee shall be entitled to require the Beneficiary to indemnify the Trustee against all liability under or in respect of the said Legal Charge

5. It is hereby declared as follows:—

(1) In the event of the rents and profits of the Property being insufficient for the purposes of discharging all moneys payable under the said Legal Charge in accordance with the trusts of clause 2 (1) hereof the Trustee shall be entitled to resort to capital for the purpose of discharging the same or such part thereof as shall not have been satisfied out of the rents and profits

(2) Where the context so admits the expression "the Trustee" shall in this Deed be deemed to include the trustees or trustee for the time being hereof

6. The power of appointing a new trustee or trustees of this Deed is vested in the Trustee [2]

IN WITNESS, *etc.*

[2] In the event of the Trustee's wishing to sell or mortgage the property, it would be necessary for him to appoint a co-trustee to act with him: Trustee Act, 1925, s. 14 (2) (*a*).

FORM 17

Sale of Flats by a Leaseholder by way of underleases, Mortgagee of Head Lease joining in to release each flat from the security

H.M. LAND REGISTRY
LAND REGISTRATION ACTS 1925 and 1926

County:
Parish or Place:
Title No.:
Property:

Parties. THIS UNDERLEASE is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Landlord") of the first part CD of *etc.* (hereinafter called "the Mortgagee") of the second part and EF of *etc.* (hereinafter called "the Tenant") of the third part

Recitals: WHEREAS:—

(1) of title; (1) The Landlord is registered at H.M. Land Registry as proprietor with a good leasehold title in respect of the leasehold property known as —— held for a term of —— years computed from the —— day of —— 19— at the rent and subject to the covenants and provisions contained in a Lease dated the —— day of —— 19— and made between *etc.* and subject also to a registered charge in favour of the Mortgagee specified in the Charges Register of the Landlord's said title

(2) of conversion of building into flats; (2) The Landlord has recently caused the building (hereinafter called "the Building") situate on and forming part of the said property to be converted into —— flats in accordance with the plan annexed hereto

(3) of intent to dispose of flats; (3) The Landlord is desirous of disposing of each of the said flats by means of a form of underlease in substantially the form of this Underlease or as near thereto as the circumstances will admit or require to the intent that any underlessee for the time being of any part of the Building may be able to enforce (so far as possible) the performance and observance of such of the covenants and provisions contained in any such

underlease as may affect such underlessee or the part of the Building to which he is entitled as such underlessee

(4) Pursuant to the said desire the Landlord has agreed with the Tenant for the grant to the Tenant of an underlease of the property described in the First Schedule hereto (hereinafter referred to as "the Flat") for the consideration at the rent and on the terms and conditions hereinafter appearing (4) of agreement with tenant;

(5) The Mortgagee in consideration of receiving such sum as is hereinafter mentioned has agreed to join in this underlease for the purpose of releasing the Flat from the registered Charge hereinbefore mentioned (5) of agreement with mortgagee.

Now in pursuance of the said agreements and in consideration of the sum of £—— on or before the execution hereof paid as to the sum of £—— by the direction of the Landlord to the Mortgagee (the payment and receipt whereof the Landlord and the Mortgagee hereby respectively acknowledge) and as to the sum of £—— being the balance of the said sum of £—— to the Landlord (the receipt whereof the Landlord hereby acknowledges) and of the rent covenants and provisions hereinafter reserved and contained THIS DEED WITNESSETH as follows:— Operative part.

1. The Mortgagee hereby releases the Flat (being part of the property comprised in the Landlord's Title above referred to) from all principal and other moneys whatsoever secured by the said registered Charge to the intent that the said Charge shall henceforth have no application to the Flat and hereby applies to the Registrar to enter all such notes on the Landlord's said Title and take all such steps as may be necessary to carry this underlease and the release herein contained into effect Release by mortgagee.

2. The Landlord hereby DEMISES unto the Tenant the Flat TOGETHER WITH the easements rights and privileges specified in the Second Schedule hereto (subject as therein mentioned) EXCEPT RESERVING AND SUBJECT TO as mentioned in the Third and Fourth Schedules hereto TO HOLD the same unto the Tenant from the —— day of —— 19— for all the residue now unexpired of the said term of —— years granted by the hereinbefore recited Lease except the last day thereof YIELDING AND PAYING therefor Yearly during the said term the rent of £—— by equal Demise.

quarterly payments clear of all deductions whatsoever (except for landlord's property tax) on the 25th day of March the 24th day of June the 29th day of September and the 25th day of December in every year the first payment thereof to be a proportionate part of the appropriate quarterly payment calculated from the date hereof to and to be paid on the quarter day next following the date hereof

Tenant's covenants with Landlord and other Flat owners:

3. The Tenant with the intent to bind so far as may be the Flat and all persons who shall for the time being be the owner of any estate or interest in or the occupier of the Flat (but save as hereinafter provided not so as to be personally liable under this clause after the Tenant shall have parted with all his estate and interest in the Flat) hereby covenants with the Landlord and as separate covenants with each of the tenants of any other part of the Building (all of whom the Landlord and the said tenants are hereinafter collectively called "the Covenantees") for the benefit and protection of the Landlord's reversion and of the parts of the building respectively vested in the said tenants and the Landlord that the Tenant will from time to time and at all times hereafter:—

(1) to repair;

(1) Put keep and maintain all such parts of the Building as are comprised in the Flat save and except the structure roof and external parts thereof in good tenantable repair order and condition as respects general condition decoration cleanliness and tidiness And without prejudice to the generality of the foregoing in every seventh year computed from the date hereof during the said term and in the last year thereof paint with two coats of proper oil colours in a workmanlike manner and paper distemper and varnish all the inside wood and iron work and other inside parts of the Flat previously painted papered distempered and varnished

(2) to permit inspection;

(2) Permit the Covenantees or any of them and their repective surveyors or agents with or without workmen and others at all reasonable times on notice to enter into and upon the Flat or any part thereof to view and examine the state and condition thereof for the purposes of the covenants and provisions herein contained

(3) Permit the Covenantees or any of them and their respective surveyors or agents with or without workmen and others at all reasonable times on notice to enter into and upon the Flat or any part thereof for the purpose of repairing any other part of the Building and for the purpose of making repairing inspecting cleansing renewing and testing all pipes drains wires conduits flues chimneys and chimney stacks serving any other part of the Building and for similar purposes so however that the works repairs inspections cleansings and alterations shall be carried out with all dispatch causing as little disturbance as possible and that the person or persons exercising the rights hereby conferred shall make good all damage done to the Flat in carrying out the same and to all decorations fixtures and movable chattels therein

(3) to permit entry for repairs etc.;

(4) Contribute and pay to the Landlord a sum (hereinafter called "the Service Charge") equal to one —— part of the costs expenses and outgoings from time to time incurred or to be incurred by the Landlord in respect of the works matters and things specified in the Fifth Schedule hereto subject to and in accordance with the provisions following that is to say:—

(4) to pay service charge;

(a) In respect of the year commencing on the —— day of —— 19— the Service Charge shall the be the sum of £——

(b) In respect of each subsequent year the Service Charge shall be a sum equal to one —— of the total amount of the said costs expenses and outgoings actually incurred by the Landlord in the immediately preceding year

(c) The Service Charge shall be paid to the Landlord by equal quarterly instalments on the quarter days specified herein for the payment of instalments of rent

(5) Observe the restrictions specified in the Fourth Schedule hereto

(5) to observe restrictions.

4. The Tenant hereby covenants with the Landlord as follows:—

Tenant's covenants with Landlord:

(1) To pay the rent hereby reserved during the term hereby granted at the times and in the manner aforesaid without any deduction except as aforesaid

(1) to pay rent;

(2) to pay rates and taxes;

(2) To pay all rates taxes assessments charges impositions and outgoings of whatsoever kind which may at any time during the said term be assessed charged or imposed upon the Flat or the owner or occupier in respect thereof and in the event of any rates taxes assessments charges impositions or outgoings aforesaid being assessed charged or imposed in respect of the Buildings to pay such proper proportion of such rates taxes charges impositions and outgoings as may be attributable to the Flat

(3) to execute works;

(3) To do and execute or cause to be done and executed during the said term all such works as under or by virtue of any Act or Acts of Parliament for the time being in force are or shall be directed or necessary to be done or executed upon or in respect of the Flat or any part thereof whether by the owner landlord tenant or occupier and will at all times keep the Landlord indemnified against all claims demands and liability in respect thereof

(4) to permit entry of Head Landlords;

(4) To permit the person or persons (hereinafter called the "Head Landlords") for the time being entitled to the reversion immediately expectant upon the determination of the term vested in the Landlord as aforesaid or their agents or their surveyors either alone or with workmen at all reasonable times to enter into and upon the Flat or any part thereof and to view and examine the state and condition thereof and of the reparation of the same and also at any time or times during the last seven years of the said term to take a schedule or inventory of the fixtures there fixed or fastened to the freehold of the Flat

(5) to permit entry for repairs;

(5) That it shall be lawful for the agents or workmen employed by the Head Landlords or for any other person to be appointed by them at all reasonable times during the said term to enter into and upon the Flat or any part thereof and to execute any works therein or to repair or rebuild any adjoining or contiguous premises or to cleanse empty renew or repair any of the sewers watercourses cesspools drains or gutters belonging to the same

(6) to give notice of assignments;

(6) At all times during the continuance of the said term to deliver or cause to be delivered to the Landlord and also to the Head Landlords a notice of every assignment disposition or devolution of or charge on or transfer of title to the Flat or any

part thereof whether by way of mortgage or otherwise within one month after the execution or signature of any deed or document or after the date of any Probate Letters of Administration or other instrument or any Order of Court by which such assignment disposition devolution charge or transfer may be effected or evidenced such notice to specify the name address and description of the person or persons to whom or in whose favour the assignment disposition devolution charge or transfer shall be made to take effect and also at the time of delivering every such notice produce the deed document instrument or Order by which such assignment disposition devolution charge or transfer shall purport to be effected or evidenced as aforesaid for the purpose of having a memorandum thereof entered in registers to be kept by the Landlord and the Head Landlords respectively for that purpose and will pay to each of them the Landlord and the Head Landlords a fee of [one] guinea for each such registration

(7) At the expiration or other sooner determination of the said term to peaceably render and yield up unto the Landlord all and singular the Flat together with all chimney pieces stoves grates bells pipes and other things existing or fixed and fastened to the Flat during the last seven years of the said term and to leave the Flat in such a state of repair as is required by the Tenant's covenant in that behalf hereinbefore contained (7) to yield up in repair;

(8) Within seven days of the receipt of the same by him give full particulars to the Landlord of any notice or proposal for notice or order or proposal for an order given issued or made to the Tenant by any authority or body under or by virtue of any Act of Parliament or by-law and if so required by the Landlord to produce such notice to the Landlord and also without delay to take all reasonable or necessary steps to comply with any such notice or order And also at the request of the Landlord to make or join with the Landlord in making such objection or objections or representation or representations against or in respect of any proposal for such notice or order as the Landlord shall deem expedient (8) to give details of notices;

(9) To pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Landlord or by (9) to pay costs.

the Landlord for the purposes of or incidental to the preparation and service of any notice under the Law of Property Act 1925 arising out of any breach of non-performance of any of the covenants on the part of the Tenant herein contained notwithstanding that forfeiture for such breach shall be avoidable otherwise than by relief granted by the court.

Landlord's covenants:

5. The Landlord hereby covenants with the Tenant (subject to the Tenant paying the rents hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on the Tenant's part to be performed and observed) but not so as to be personally liable after he shall have transferred all his estate and interest in the property comprised in the said Lease dated the —— day of —— 19— hereinbefore recited as follows:—

(1) quiet enjoyment;

(1) That the Tenant shall and may peaceably and quietly hold and enjoy the Flat during the said term without any lawful interruption or disturbance from or by the Landlord or any person or persons rightfully claiming under or in trust for the Landlord

(2) to insure;

(2) That the Landlord will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Tenant or the tenant or occupier of any part of the Building) insure and keep insured the Building against loss or damage by fire and such other risks (if any) as the Landlord may think fit in the offices of —— —— —— Limited or other offices of repute in the full amount of the current cost of rebuilding the same or such greater sum as the Landlord shall think fit and whenever required produce to the Tenant the policy or policies of such insurance and the receipt for the last premium for the same and will in the event of the Building being damaged or destroyed by fire as soon as reasonably practicable lay out the insurance moneys in the repair rebuilding or reinstatement of the said building

(3) to carry out flat scheme;

(3) That the Landlord will not dispose of any of the other flats comprised in the Building save by underlease in the form of the present Underlease or as near thereto as the circumstances may admit or require

(4) That the Landlord will maintain repair redecorate and renew (a) the main structure of the Building including the roof chimney stacks gutters rainwater pipes and window frames (b) the gas and water pipes drains and electric cables and wires in under and upon the Building and enjoyed or used by the Tenant in common with the owners lessees and occupiers of other parts of the Building and (c) the main entrances passages landings staircases and all such other internal parts of the Building as are used by the Tenant in common with others as aforesaid (4) to repair structure;

(5) That the Landlord will so far as practicable keep reasonably lighted such of the passages landings and staircases as are so used by the Tenant in common with others as aforesaid (5) to light passages;

(6) That the Landlord will in the third year computed from the —— day of —— 19— and in every subsequent third year computed as aforesaid paint all the outside wood and iron work stucco rendering and plasterwork and other outside parts of the Building previously or which ought to be painted with two coats at least of proper oil colours in a workmanlike manner in such colour or colours as the tenants (including the Tenant) for the time being of the Landlord of any part or parts of the Building shall jointly signify or in default of agreement in the same colour or colours as the same were previously decorated or as near thereto as practicable (6) to decorate;

(7) That if so required by the Tenant they will enforce or join with the Tenant in enforcing the covenants in like terms as those contained in clause 3 hereof entered into or to be entered into by the tenants of other parts of the Building on the Tenant's indemnifying the Landlord against all costs and expenses in respect of such enforcement and providing such security in respect of such costs and expenses as the Landlord may reasonably require (7) to enforce covenants.

6. Provided always and it is hereby agreed and declared as follows:— Provisos:

(1) If during the said term the said rent or sums of money hereby reserved or made payable or any of them or any part or parts thereof respectively shall be in arrear and unpaid for (1) Forfeiture;

21 days after the same shall have become due (whether the same shall have been formally demanded or not) or if and whenever there shall be any breach non-observance or non-performance of any of the covenants agreements or conditions herein contained on the part of the Tenant then and in any such case it shall be lawful for the Landlord at any time thereafter and notwithstanding the waiver of any previous right of re-entry to re-enter into and upon the Flat or any part thereof in the name of the whole and thereupon the said term hereby granted shall absolutely cease and determine but without prejudice to any right of action or remedy which may then have accrued to the Landlord in respect of any antecedent breach or non-observance or non-performance of any of the Tenant's covenants conditions or agreements herein contained

(2) severance. (2) That every internal wall separating the Flat or any part thereof from any other part of the Building shall be a party wall severed medially

(3) definitions. (3) That the expressions "the Landlord" "the Tenant" and "the Covenantees" shall where the contract so admits and without prejudice to the operation of sections 78 and 79 and 141 of the Law of Property Act 1925 respectively include their respective successors in title and the persons claiming through or under them and where the Tenant or the Landlord or the Covenantees respectively consist of two or more persons all the covenants by and with the Purchaser the Vendor or the Covenantees respectively shall be deemed to be by and with such persons jointly and severally

Certificate as to value. 7. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £——

IN WITNESS, *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO

The Flat

Parcels. ALL THAT flat or suite of rooms numbered or to be numbered —— and situate on the —— floor of the Building and lying

between [above] [below] a horizontal plane following the line of the lower edge of the joists or timbers forming the floor of the said flat [or the flat immediately above the said flat] [and another plane following the line of the lower edge of the joists or timbers forming the floor of the flat immediately above the said flat] as the same is shown on the plan annexed hereto and thereon coloured pink [TOGETHER WITH the piece or pieces of garden or open land situate at the rear of the Building]

THE SECOND SCHEDULE ABOVE REFERRED TO

Easements Rights and Privileges included in the Underlease

Appurtenant rights.

1. Such easements and benefits of or in the nature of support and protection from the elements for the Flat or any part thereof as are now enjoyed by the same or as are necessary to ensure for the Tenant the right to enjoy such facilities and benefits of or in the nature of support and protection from the elements for the Flat or any part thereof as have hitherto been enjoyed or capable of being enjoyed over or in respect of any other part of the Building by reason of the Building having been held under a common title

2. The right of free and uninterrupted passage and running of gas electricity water soil smoke and fumes to and from the Flat or any part thereof through or from pipes tanks wires drains conduits flues and chimneys which are now or may at any time hereafter be in under or passing through any other part of the Building

3. Full right and liberty for the Tenant and all persons authorised by him (in common with all other persons entitled to the like right) at all times by day or by night and for all purposes to go pass and repass through and along the main entrances of the Building and the passages landings and staircases therein leading to the Flat

4. The right for the Tenant with or without servants workmen and others at all reasonable times and from time to time upon notice (except in case of emergency) to enter into and upon any part of the Building for the purpose of maintaining or

decorating the Flat or of inspecting cleansing repairing renewing and installing so far as may be necessary any such pipes tanks wires drains conduits flues and chimneys as aforesaid causing as little disturbance as possible and making good all damage caused

5. The benefit of the covenants and restrictions contained or to be contained in the underleases of the other flats comprised in the Building granted or to be granted

6. Provided that all the foregoing easements rights and privileges are subject to and conditional upon the Tenant paying the rent hereby reserved and contributing and paying the Service Charge referred to in clause 3 (4) hereof

The Third Schedule above referred to

Exceptions and Reservations

Exceptions and reservations.

There is excepted and reserved out of this Underlease to the Landlord and the owners and tenants of the other flats comprised or partly comprised in the Building:—

1. Easements rights and privileges over along and through the Flat equivalent to those specified in paragraphs —— —— —— —— of the Second Schedule hereto

2. Power for the Landlord and his surveyors or agents with or without workmen and others at all reasonable times on notice (except in case of emergency) to enter the Flat for the purpose of carrying out his obligations under clause —— hereof

The Fourth Schedule above referred to

Restrictive Covenants

Restrictions.

1. Not to use or occupy the Flat nor permit the same to be used for any purpose whatsoever other than as a private residential flat in the occupation of one family only nor for any purpose from which a nuisance or annoyance can or might arise to the owners tenants and occupiers of any part of the Building or of any property in the neighbourhood nor for any illegal or immoral purpose

2. Not to place erect attach to or exhibit or permit to be placed erected attached to or exhibited on the Flat or any part

thereof or upon or to or through any windows of the Building any name legend sign notice or advertisement of any kind or nature whatsoever

3. Not to build or set up or suffer to be built set up or maintained on the Flat any erection or building other than or in addition to the Flat and buildings now forming part thereof nor make any alteration in the plan or elevation of the Flat or in any party or other wall nor make or maintain or suffer to be made or maintained any addition thereto either in height or projection nor place nor attach or maintain any structure whatsoever on or to any part of the Flat or make or suffer to be made any material change or addition whatsoever in or to the use of the Flat or any building or buildings or erection forming part thereof

4. Not by building or otherwise to stop or obstruct the access of any light or air belonging to or enjoyed by any premises the estate or interest whereof in possession or reversion may be in the Head Lessors or any person or persons in trust for them nor permit any new window light opening doorway path passage drain or other encroachment rights or easements to be made or acquired into against or upon the Flat which might be or grow to the damage annoyance or inconvenience of the Head Lessors And in case any such window light opening doorway path passage drain or other encroachment shall be made or attempted to be made or any such right or easement attempted to be acquired will give immediate notice thereof to the Landlord and at the request of the Landlord will adopt such means as may be reasonably required or deemed proper for preventing any such encroachment or the acquisition of any such easement

5. Not to assign sub-let share part with the possession of or hold as agent or in trust for any person part only of the Flat

6. Not to suffer or permit anything upon the Flat which would or might lessen the support or protection from the elements thereby given to other parts of the Building

7. Not to throw dirt rubbish rags or other refuse or permit the same to be thrown into the sinks baths lavatories cisterns tanks or waste or soil pipes or out of the windows of the Flat

8. Not to hang or expose washing or any clothes or materials on any part of the Flat so as to be visible from outside the Flat

9. Not to permit any singing or instrumental music in the Flat between the hours of 11 p.m. and 9 a.m. nor use or permit or suffer to be used a wireless or television set or apparatus so as to be audible outside the Flat if the occupier of any other part of the Building shall object thereto nor place or keep any dustbin or other refuse container under or near or so as to be visible from any of the windows of the Building

10. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance on the Building or any part thereof or cause an increased premium to be payable in respect thereof

The Fifth Schedule above referred to

Costs expenses outgoings and matters works and things in respect of which the Tenant is to pay a Service Charge

Common expenses.

1. The costs and expenses of maintaining repairing redecorating and renewing (a) the main structure including the roof chimney stacks gutters rainwater pipes and window frames of the Building (b) the gas and water pipes drains and electric cables and wires in under or upon the Building and enjoyed or used by the Tenant in common with the owners and tenants of other parts of the Building and (c) the main entrances passages landings and staircases of the Building so enjoyed or used by the Tenant in common with others as aforesaid

2. The cost of cleaning lighting and carpeting the passages landings staircases and other parts of the Building so enjoyed or used by the Tenant in common with others as aforesaid

3. The cost of decorating the exterior of the Building

4. All rates taxes and outgoings (if any) payable by the Landlord in respect of the whole or any part or parts of the Building

5. The cost of insuring and keeping insured the Building against such risks and for such amount as are mentioned in clause 5 (2) hereof

6. All costs charges and expenses (including solicitors' costs

and surveyors' fees) incurred by the Head Lessors for the purposes of or incidental to the preparation and service of any notice under the Law of Property Act 1925 arising out of any breach or non-performance of any of the covenants on the part of the Tenant herein contained notwithstanding that forfeiture for such breach shall be avoidable otherwise than by relief granted by the court

7. The costs and expenses incurred by the Landlord in the general management of the Building or any part or parts thereof including the expenses of collecting rents and Service Charges and generally performing his obligations or exercising his powers hereunder or under any other underlease of (or including) any part or parts of the Building

8. The costs and expenses incurred by the Landlord not falling under any of the preceding heads of or incidental to the performance of his obligations or the exercise of his powers hereunder or under any other underlease of (or including) any part or parts of the Building

FORM 18

Mortgage of Shares, Principal to be repaid by instalments

THIS MORTGAGE is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called " the Borrower " which expression where the context so admits shall include the Executors Administrators and Assigns of the Borrower) of the one part and CD of *etc.* (hereinafter called " the Mortgagee " which expression shall where the context so admits include the Executors Administrators and Assigns of the Mortgagee) of the other part

WHEREAS :—

(1) The Borrower is beneficially entitled free from incumbrances to the shares whereof short particulars are set out in the Schedule hereto

(2) The Mortgagee has agreed with the Borrower to lend to him the sum of £—— upon having the repayment thereof with interest thereon at the rate hereinafter mentioned secured in the manner hereinafter appearing

(3) In order to enable the Borrower to raise the principal moneys and interest payable under this Mortgage the Mortgagee has agreed with the Borrower that upon being called upon so to do by the Borrower the Mortgagee will at the expense of the Borrower execute and do all such acts and things as may be necessary to enable the Borrower to create a first mortgage in favour of a bank of the shares hereby mortgaged to secure a sum not exceeding £—— together with the interest and charges thereon to the intent that the said Mortgage should rank in priority to the Mortgage hereby made

(4) The Borrower has agreed with the Mortgagee to deposit with the Mortgagee the Share Certificates relating to the said shares specified in the Schedule hereto together with such transfers executed in blank of such shares as are hereinafter mentioned

NOW IN PURSUANCE OF THE SAID AGREEMENT and in consideration of the sum of £—— now paid to the Borrower by the Mortgagee (the receipt whereof the Borrower hereby acknowledges) THIS DEED WITNESSETH as follows :—

1. The Borrower hereby covenants with the Mortgagee to pay to the Mortgagee on the —— day of —— next the sum of £—— with interest thereon from the date hereof at such a rate per cent. per annum as shall be equal to £—— per cent. above the rate of discount for the time being allowed by the Bank of England on approved Bills of Exchange (commonly referred to as "The Bank Rate") and also so long as any principal money shall remain due hereunder or under any Order for payment or judgment obtained hereunder after the day hereinbefore fixed for payment of the same to pay to the Mortgagee interest thereon at the rate aforesaid by equal half yearly payments on the —— day of —— and the —— day of —— in every year PROVIDED ALWAYS that if and so long as (but not further or otherwise) the Borrower shall pay to the Mortgagee instalments of the principal sum hereby secured of the amount at the times and in manner following that is to say by four equal half yearly payments of £—— each on the —— day of —— and the —— day of —— in this and the following year[s] whereof the first of such instalments is to be paid on the —— day of —— next and shall make each such payments of principal punctually on the said respective days so appointed for the payment thereof then the Mortgagee shall accept payment of the said principal sum at the times and in the manner aforesaid and will not require payment of such principal sum otherwise than by such instalments and will so long as the provisions of this proviso are being carried into effect accept interest at the rate of —— on the said principal sum or so much thereof as may from time to time remain owing hereunder in lieu of interest at the rate hereinbefore covenanted to be paid

2. The Borrower hereby charges all and singular the said shares specified in the Schedule hereto with the repayment to the Mortgagee of the principal moneys and interest hereinbefore covenanted to be paid by the Borrower to the Mortgagee

3. PROVIDED ALWAYS that

(1) If the Borrower shall pay to the Mortgagee the said principal sum of £—— with interest thereon at the said rate of —— by any one of the three alternative methods that is to say

(a) On or before the said —— day of —— next or

(b) By the instalments at the times and in the manner hereinbefore contained or

(c) Whilst the Borrower shall be repaying the said principal sum by the instalments at the times and in the manner hereinbefore contained (but not further or otherwise) then at any time whilst he shall be so repaying the said principal

or

(2) In any case not falling under sub-paragraph (1) of this clause if the Borrower shall pay to the Mortgagee the said principal sum of £—— together with interest thereon at the rate first hereinbefore mentioned

Then and in any such case the Mortgagee shall at the request and cost of the Borrower retransfer to the Borrower or according to his directions such (if any) of the shares specified in the Schedule hereto as shall have been transferred into the name of the Mortgagee and shall deliver up to the Borrower such of the said Transfers executed in blank as shall not have been completed and the share certificates relating to the said shares

4. At any time after the principal sum hereby covenanted to be paid to the Mortgagee or the balance thereof for the time being remaining unpaid shall have become due and payable to the Mortgagee and recoverable by him by action the following provisions shall have effect

(1) The Mortgagee shall be entitled to receive all dividends and bonuses becoming due on the shares hereby mortgaged

(2) The Mortgagee may by writing under his hand appoint such person as he thinks fit to be a receiver of all or any dividends and bonuses declared and payable in respect of the said shares or any of them and any receiver so appointed shall be deemed to be the agent of the Borrower who shall be solely responsible for his acts or defaults and the provisions of the Law of Property Act 1925 relating to receivers appointed by Mortgagees including the provisions of section 109 of the said Act (other than those of subsection (1) of section 109 aforesaid) shall apply to and be applicable with respect to any receiver so appointed

(3) The Mortgagee may insert his own name or the name of any purchaser in all or any of the said transfers executed in blank and may in the name of the Borrower sign seal and deliver all or any of the said transfers and may cause any such transfer to be registered.

AND IT IS HEREBY DECLARED that in favour of a purchaser of the said shares or any of them a statement in writing by the Mortgagee that the powers hereby conferred have become exercisable shall be conclusive evidence for all purposes of the truth thereof

(4) The Borrower shall if and whenever he shall be so required by the Mortgagee to do at his own cost execute all such documents and do all such acts and things as may be necessary to enable the Mortgagee or a purchaser from the Mortgagee to be registered as the owner of the said shares hereby mortgaged or any of them

5. If at any time during the continuance of this security the Borrower shall be desirous of creating a first mortgage over the shares hereby mortgaged in favour of a bank to secure a principal sum not exceeding £—— together with all usual interest and charges on the said sum then and in any such case the Mortgagee will at the request and cost of the Borrower execute all such documents and do all such acts and things as may be necessary to enable the Borrower to create a First Mortgage over the said shares in favour of such Bank having priority to the Mortgage hereby created and in any such case the provisions of this Mortgage shall have effect so far as applicable as if the same had originally been created subject to such Mortgage but subject to no other charge or interest whatsoever PROVIDED THAT it shall be a term of the said First Mortgage to be so created that all advances of principal money which shall be made thereunder shall be paid to the Mortgagee in discharge of the principal sum and interest payable hereunder

IN WITNESS, *etc.*

THE SCHEDULE BEFORE REFERRED TO

Shares of which the Borrower is the Beneficial Owner

FORM 19

Will of married man providing for wife and children

1. I AB of *etc.* hereby revoke all testamentary dispositions heretofore made by me and declare this to my last Will which I make this —— day of —— 19—

2. I APPOINT CD of *etc.* and EF of *etc.* (hereinafter called "my Trustees" which expression shall where the context so admits include the survivor of my Trustees or other the trustees or trustee for the time being of this my Will) to be the executors and trustees of this my Will

3. I BEQUEATH the following legacies free of all death duties

(1) My grandfather clock to my nephew GH

(2) My gold watch to my grandson IJ In the event of my death before my said grandson shall have attained the age of 21 years I nevertheless direct my Trustees to deliver the said watch to my said grandson and I declare that if my trustees shall carry out this direction my Trustees shall be freed and discharged from all liability in regard to the said watch and shall not be further concerned therewith

(3) *Etc.*

4. I DEVISE my freehold dwelling-house —— —— —— to my wife —— absolutely

5. I DEVISE AND BEQUEATH all the real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of and which I can dispose of by Will unto my Trustees UPON TRUST to sell call in and convert into money such part or parts thereof as shall not consist of money with full power at their discretion to postpone such sale calling in and conversion and to stand possessed of the net proceeds of sale and the property and investments for the time being representing the same (hereinafter called "my residuary trust fund") upon the following trusts that is to say:—

(1) If my said wife shall be living at the expiration of 28 days from the date of my death upon trust to pay the income of my residuary trust fund (or of so much thereof as may from

time to time remain unapplied under the provisions hereinafter contained) to my said wife during her life and subject thereto upon trust as to the capital of my residuary trust fund:—

(a) From time to time to pay thereout to or for the benefit of my said wife such a sum or sums as my Trustees shall in their absolute discretion think fit PROVIDED that the sum or sums so paid or applied in any period of twelve months shall not exceed in the aggregate the sum of £——

(b) Subject as aforesaid to pay the same to such of them my sons KL and MN and my said daughters OP and QR as shall survive my said wife and if more than one shall so survive in equal shares PROVIDED that in the event of any son or daughter of mine (or all of them) predeceasing my said wife leaving a child or children him or her surviving who shall also survive my said wife [and attain the age of 21 years] such child or children shall take (if more than one in equal shares) the share of my residuary trust fund which his or their parent would have taken had he or she survived my said wife

(2) If my said wife shall predecease me or shall not be living at the expiration of the said period of 28 days from the date of my death then upon trust as to the capital of my residuary trust fund

(a) To pay thereout the following pecuniary legacies free of all death duties that is to say:—

[*Pecuniary legacies*]

(b) Subject as aforesaid to pay the same to such of them my said sons and daughters as shall survive me and if more than one shall survive me in equal shares Provided that in the event of any such son or daughter (or all of them) predeceasing me leaving a child or children him or her surviving [who shall attain the age of 21 years] such child or children shall take (if more than one in equal shares) the share of my residuary trust fund which his or their parent would have taken had he or she survived me

6. Moneys forming part of my residuary trust fund may from time to time be invested or applied in the purchase of or at interest upon the security of such stocks funds shares securities

or other investments or property of whatsoever nature and wheresoever (including the purchase of a freehold or leasehold dwelling-house for use as a residence) and whether involving liabilities or not or upon such personal credit with or without security as my Trustees shall in their absolute discretion think fit

7. Any executor or trustee hereof being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or proper charges for business transacted time expended and acts done by him or by any partner of his or by his firm in connection with the trusts hereof including acts which an executor or trustee not being in any profession or business could have done personally

IN WITNESS, *etc.*

FORM 20

Sale of Lease by sub-mortgagees (debenture holders) where the head mortgagor's right of redemption has become statute-barred and the head mortgagee (a company) has gone into liquidation

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN AB of *etc.* and CD of *etc.* (hereinafter together called "the Vendors" and EF of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) By a Lease (hereinafter called "the Lease") dated the —— day of —— 19— and made between *etc.* the property described in the Schedule hereto was demised to the said —— from the —— day of —— 19— for the term of —— years at the yearly rent of £—— subject to the covenants on the part of the Lessee and conditions therein contained including a covenant by the Lessee not to assign charge underlet or part with the possession of the said property or any part thereof without the written consent of the Lessor

(2) By an Assignment dated the —— day of —— 19— and made between the said Lessee of the one part and GH of the other part the said property was assigned to the said GH for the residue of the then unexpired term granted by the Lease

(3) By a Mortgage dated the —— day of —— 19— and made between the said GH of the one part and XY Limited (hereinafter called "the Company") of the other part the said GH charged the said property by way of Legal Mortgage with the payment to the Company of the principal money interest and other money thereby covenanted to be paid

(4) By a Debenture dated the —— day of —— 19— and issued by the Company in favour of IJ the Company thereby charged with the payments therein more particularly mentioned the whole of its property and assets present and future including its uncalled or unpaid capital for the time being and it was

provided by and in the said Debenture that the same should rank as a First Charge on the property and assets thereby charged

(5) In or about the year 19— the Company went into liquidation and at about the same time the said IJ entered into possession or receipt of the rents and profits of the property and continued in such possession and receipt until his death on the —— day of —— 19— [1]

(6) By his Will dated the —— day of —— 19— the said IJ appointed the Vendors to be his Executors and on the —— day of —— 19— probate of the said Will was granted to the Vendors out of the —— Probate Registry [at ——]

(7) From the said —— day of —— 19— until the date of the Appointment hereinafter recited the Vendors were in possession or receipt of the rents and profits of the said property and duly applied the same in part satisfaction of the moneys owing under the said Debenture

(8) By an Appointment dated the —— day of —— 19— made by the Vendors the Vendors appointed KL to be the Receiver of the said property upon the terms and with and subject to the powers and provisions contained in the said Debenture and from and after the said date the said KL has been and still is in possession or receipt of the rents and profits of the said property and has at all material times applied the same in part satisfaction of the moneys owing under the said Debenture

(9) Since the Vendors entered into possession or receipt of the rents and profits of the said property as aforesaid neither the Vendors nor the said KL nor any person deriving or purporting to derive title through or under them or him has made any acknowledgment of the title of the said GH or of his right of redemption to or in respect of the said property or received from the said GH or from any other person on his behalf any sum on account of principal or interest under the hereinbefore recited Mortgage and at no time during the said period has the said GH or any person deriving or purporting to derive title through or under him either brought any action or suit to redeem

[1] The facts recited in recitals (5), (7), (8) and (9) would require to be proved by a statutory declaration.

the said Mortgage or made any claim to be entitled to the said property or the rents or profits thereof or any part of such rents or profits

(10) The said —— as the Lessor under the Lease hereby signifies his consent to the Assignment hereby made

(11) The Vendors as such personal representatives as aforesaid and in exercise of the power conferred on them by virtue of the said Debenture and under and by virtue of the Law of Property Act 1925 have agreed with the Purchaser for the sale and transfer to him of the said property for the residue of the term granted by the Lease for the sum of £——

Now in pursuance of the said Agreement and in consideration of the sum of £—— at or before the execution hereof paid by the Purchaser to the Vendors (the receipt whereof the Vendors hereby acknowledge) NOW THIS DEED WITNESSETH as follows:—

1. The Vendors as personal representatives in exercise of the power for this purpose conferred upon them by the Law of Property Act 1925 and of every other power enabling them in this behalf hereby assign unto the Purchaser all the property comprised in and demised by the Lease to hold the same unto the Purchaser for all the residue now unexpired of the said term of —— years granted by the Lease

2. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £——

IN WITNESS, *etc.*

FORM 21

Preliminary Inquiries [1]

(Drafted by Iain S. Wickenden and Stephen B. Edell)

1. *Deeds*
   (a) Are all the title deeds (including the land or charge certificate where appropriate) in the custody of the vendor's solicitor?
   (b) If not, please give the name and address of each person who has custody of any of them.
2. *Boundaries*
   To whom do all the boundary walls, fences, hedges and ditches belong?
   (To be omitted for property within the County of London unless there is special reason to inquire).
3. *Breaches of covenant*
   Has any complaint been made to the vendor (or his solicitor) of any breach of any covenant or agreement affecting the property (including any breach of the lease, in the case of leasehold property)?
4. *Town and Country Planning*
   (a) What is the present use of the property?
   (b) Has this changed in any way during the past four years?
   (c) When was the house/shop built? [This partly out of interest, partly as a guide to matters which may need looking into by the surveyor and partly as a matter of planning]
   (d) Have any building or similar operations been carried out in the past four years?
   (e) Has any new access to the highway been made in the past four years?
   (f) Have you or the vendor heard of any development proposed (whether in the development plan or otherwise) in the neighbourhood which might affect the property?

[1] See p. 348, *ante*.

5. *Third party rights*

(a) Does the owner or occupier of any neighbouring property, or the public, either exercise or claim any rights over the property being sold?

(b) In particular, do the services to any neighbouring property traverse the property or is there any right of way over the property?

6. *Outgoings*

(a) What is the rateable value?

(b) What is the net annual value for Schedule "A"?

(c) Apart from these two, and water rate, are there any other outgoings? In particular, is either land tax or tithe redemption annuity payable? If not, is any certificate of redemption held?

(d) What is the address and reference number of the local Inspector of Taxes?

(e) Please confirm that on completion the purchaser will be provided with the vendor's written authority for the Inspector of Taxes to furnish to the purchaser any information in his possession concerning any maintenance claim relating to the property and made during the past five years, and that (whether any such claim has been made or not) the vendor will supply the purchaser with any information in his possession which would assist the purchaser to make such a claim.

7. *Notices*

Please give particulars of any notices affecting the property which have been:

(i) served by the vendor;

(ii) received by the vendor.

8. *Fixtures and fittings*

(a) Does the vendor propose to remove any fixtures or fittings (including garden plants) from the property?

(b) Are any of the fixtures and fittings (other than the telephone and service company meters and switchgear) on hire or hire-purchase?

9. *Leaseholds*
   (a) Is the lease which is being bought an underlease or a head lease?
   (b) If an underlease, who are the head lessees?
   (c) By whom and at what intervals is the rent collected?
   (d) To whom should the purchaser's references for the purpose of the licence to assign be sent?—and is any special reference required?
10. *Services*
   Does the property drain directly to a public sewer and does it draw its water and other services direct from the pipes, wires, etc., of the statutory undertakings without traversing the land of any other person?
11. *Access*
   If the property stands on a private road, can the vendor grant or convey (and show title to) a valid right of way from the property to the public highway?
12. *Disputes*
   Do you or the vendor know of any dispute, actual or potential, with the occupier of any nearby property?
13. Please give particulars of:—
   (a) The existing fire insurance policy, stating the number of the policy, in which office, in whose names, for what amount and up to what period the property is insured, and the premium payable;
   (b) All approvals of, or refusals to approve, plans of buildings and alterations to buildings under the by-laws during the period of the vendor's ownership of the property and, in relation to any earlier period, any such particulars which the vendor can give.
14. What date is suggested for completion?

FORM 22

Conveyance of freeholds by the executors of a sole surviving trustee for sale where there has been an assignment of a lease before 1926 to two persons taking as tenants in common and a conveyance after 1925 of the freehold reversion to the same persons taking as joint tenants [1]

(*Supplied by Messrs. Frank Platt & Fishwick, Solicitors*)

THIS CONVEYANCE is made the —— day of —— One thousand nine hundred and —— BETWEEN A of *etc.*, and B of *etc.*, (hereinafter called "the Vendors") of the one part and C of *etc.*, (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) Immediately before the commencement of the Law of Property Act 1925 D and E were possessed of the property described in the Schedule hereto for the residue of a term of —— years from the —— day of —— One thousand nine hundred and —— created by a Lease (hereinafter called "the Lease") dated the —— day of —— One thousand nine hundred and —— and made between F of the one part and G of the other part as tenants in common in equal shares

(2) By the operation of the Law of Property Act 1925 the said term of years subsisting in the said property by virtue of the Lease became vested in the said D and E as joint tenants upon the statutory trusts for sale and otherwise by the said Act provided

(3) By a Conveyance (hereinafter called "the Conveyance") dated the —— day of —— One thousand nine hundred and —— and made between H of the one part and the said D and E of the other part the said property was conveyed unto the said D and E in fee simple as joint tenants subject to the Lease and

[1] This form is designed to meet the case where the same person has become entitled to the equitable interests in the leasehold and freehold estates and if is desired to keep the dealings with the equitable interests off the title.

the term of years thereby created but with the benefit of the yearly rent of £—— thereby reserved and of the conditions and covenants on the part of the lessee therein contained

(4) The Conveyance did not contain any express trust for sale and accordingly by the operation of section 36 of the said Act the said estate in fee simple in respect of the said property became vested in the said D and E upon the statutory trusts for sale and otherwise by the said Act provided

(5) The said D died on the —— day of —— One thousand nine hundred and ——

(6) The said E died on the —— day of —— One thousand nine hundred and —— having by his Will dated the —— day of —— One thousand nine hundred and —— appointed the Vendors to be the executors and trustees thereof who duly proved the same in the —— Probate Registry on the —— day of —— One thousand nine hundred and ——

(7) By virtue of section 23 of the said Act the said statutory trust for sale arising under the Conveyance is still subsisting and accordingly the Vendors stand possessed of each estate respectively created by the Lease and the Conveyance as trustees upon the statutory trusts for sale

(8) The Vendors hereby declare that in case the said legal estate for the residue of the said term of years created by the Lease shall not previously have merged in the said estate in fee simple the residue of the said term shall forthwith merge and be extinguished in the estate in fee simple in the said property vested in them the Vendors as aforesaid

(9) In exercise of the said trust for sale the Vendors have agreed with the Purchaser for the sale to him of the unincumbered fee simple in possession of the said property at the price of £——

NOW THIS DEED WITNESSETH as follows:—

1. IN consideration of the sum of £—— now paid by the Purchaser to the Vendors (the receipt whereof the Vendors hereby acknowledge) the Vendors as Trustees hereby convey unto the

Purchaser ALL AND SINGULAR the property described in the Schedule hereto TO HOLD the same unto the Purchaser in fee simple

2. CERTIFICATE OF VALUE

IN WITNESS, *etc.*

THE SCHEDULE REFERRED TO

Description of Property.

Attestations.

FORM 23

Agreement for Employment by a Company of Sales Staff on a Commission Basis

THIS AGREEMENT under Seal is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "Mr. AB") of the first part CD of *etc.* (hereinafter called "Mr. CD") of the second part and EF of *etc.* (hereinafter called "Mr. EF") of the third part

WHEREAS:—

Mr. AB is a director and the controlling shareholder of XY Limited whose registered office is situate at —— in the County of —— (hereinafter called "the Company") and the parties are desirous of promoting the sale by the Company of —— to the public on hire-purchase terms upon the terms and subject to the provisions hereinafter contained

Now in pursuance of the said desire and in consideration of the premises THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED as follows:—

1. (1) Mr. AB will as soon as conveniently may be after the execution of this Agreement:—

(a) Pay into the Banking account of the Company or otherwise make available to the Company's credit such a sum or sums not exceeding in the aggregate the sum of £—— as may from time to time be required for the purpose of enabling the Company to sell —— to the public on hire-purchase terms and generally in accordance with the terms of this Agreement;

(b) Procure the Company to enter into Service Agreements with Mr. CD and EF upon the respective sets of terms hereinafter set forth concerning the same

(c) Procure the Company from time to time and as the circumstances may require to do all such acts and things as may be required for enabling the Company to sell —— aforesaid to the public on hire-purchase terms

(2) For the purposes of this Agreement the expression "hire-purchase terms" shall mean such terms for the sale of —— on hire-purchase as shall from time to time be recommended by

Mr. EF to the Company and accepted by the Company as appropriate

2. As soon as conveniently may be after the execution of this Agreement Mr. CD will enter into a Service Agreement with the Company whereby the Company shall employ Mr. CD and Mr. CD shall serve the Company as general sales manager on the terms and subject to the provisions following that is to say:—

(1) The engagement shall continue for a period of —— years subject nevertheless to the provisions for determination hereinafter contained

(2) Mr. CD shall devote such time to the Company's affairs and employ at his own expense such assistant or assistants as may from time to time be necessary for the pursuit and promotion of the Company's said business

(3) During the continuance of his engagement Mr. CD shall be entitled to receive by way of remuneration the following sum or sums that is to say:—

(a) In respect of every sale by the Company of a —— the sum of £—— representing the amount of the initial deposit paid by the purchaser under the hire-purchase agreement entered into by him and

(b) The amount (if any) of the net profits of the Company as shall from time to time be derived from sales of —— after deducting therefrom the following payments costs and expenses namely (i) all sums paid or payable under paragraph (a) of this sub-clause (ii) all sums paid or payable under clause 3 and clause 4 hereof (iii) all overhead costs and expenses of the Company including but not by way of limitation the payment of rent and costs and expenses in respect of telephones stationery cars office salaries accounting charges and maintenance

(4) The above-mentioned remuneration shall be paid as to that part thereof mentioned in paragraph (a) immediately the same shall be received by or on behalf of the Company and as to that part thereof mentioned in paragraph (b) within 21 days after the issue of the certificate of the Auditors of the Company hereinafter provided for

(5) Within one month after the end of each financial year of the Company ending on the —— day of —— the Company shall cause its Auditors to prepare an account showing therein the gross sale returns of the Company for such year upon which Mr. CD is entitled to be paid remuneration under the provisions of paragraph (b) of sub-clause (3) of this clause and the amount of the net profit attributable to such sales which remains (if any) after deducting therefrom all the payments costs and expenses referred to in the said paragraph (b) and to certify in writing the amount of Mr. CD's said remuneration accordingly and unless some error shall be discovered within fourteen days after the issue of the aforesaid certificates of the said Auditors such certificates shall be conclusive evidence as to the amount of Mr. CD's said remuneration

(6) Mr. CD shall be entitled to —— weeks holiday during each year at such time or times as the Company may consider convenient

(7) In the event of gross default or misconduct or breach or non-observance of any of the provisions herein contained on the part of Mr. CD to be performed or observed the Company may forthwith determine Mr. CD's engagement hereunder

(8) If Mr. CD's engagement hereunder shall through any cause whatsoever cease during the currency of any financial year of the Company the remuneration (if any) earned by Mr. CD prior to such cessation and remaining unpaid by the Company shall be paid to Mr. CD or his personal representatives within 21 days after the issue of the certificate of the Auditors provided for in sub-clause (5) hereof

(9) For a period of [two] years next after the determination of Mr. CD's engagement hereunder and at all times during the said engagement Mr. CD shall not on behalf of himself or of any other person or persons firm or company except the Company itself canvass or solicit orders from any person or persons companies or firms who shall at any time during the continuance of his engagement have been a customer of the company and as and by way of a separate covenant on the part of Mr. CD shall not during the period aforesaid directly or indirectly be

concerned or engaged or interested in any business of a kind similar to the business carried on by the Company during the continuance of Mr. CD's engagement with the Company within a radius of 25 miles from the place of the said registered office of the Company

3. As soon as conveniently may be after the execution of this Agreement Mr. EF will enter into a Service Agreement with the Company whereby the Company shall retain Mr. EF and Mr. EF shall serve the Company in the capacity of financial consultant to the Company upon and subject to the provisions following that is to say:—

(1) The engagement shall continue for a period of —— years unless and until determined in the manner hereinafter provided [or by Mr. EF serving upon the Company not less than three months' notice in writing of his desire to determine the same]

(2) During the continuance of his engagement Mr. EF shall be entitled by way of remuneration to the sum of —— in respect of every sale by the Company on hire-purchase terms of a ——

(3) The above-mentioned remuneration shall be paid monthly and the remuneration payable in respect of any one month shall be paid within 21 days from the end of that month

(4) In the event of gross default or misconduct or breach or non-observance of any of the provisions herein contained on the part of Mr. EF to be performed or observed the Company may forthwith determine Mr. EF's engagement hereunder

4. In respect of every sale by the Company of a —— Mr. AB shall be entitled to receive and be paid by the Company the sum of

IN WITNESS, *etc.*

FORM 24

Deed of Indemnity against Surtax Directions on Purchase of Shares in a Company

THIS DEED OF INDEMNITY is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Vendor") of the first part CD of *etc.* (hereinafter called "the Purchaser") of the second part and XY LIMITED whose registered office is situate at —— in the County of —— (hereinafter called "the Company") of the third part

WHEREAS:—

(1) The Vendor has agreed with the Purchaser for the sale and transfer to or according to the Purchaser's directions of certain shares including shares in the Company for a total purchase price of £——

(2) It was a term of the said Agreement that the Vendor would give to the Company such indemnity as is hereinafter contained

Now in pursuance of the said Agreement THIS DEED WITNESSETH that the Vendor hereby covenants with the Company that the Vendor will at all times hereafter save harmless and keep indemnified the Company and its assigns from and against any depletion of its assets by reason of any claim for surtax already assessed or which may hereafter be assessed in the name of the Company on the Vendor as a result of any directions or apportionments by the Special Commissioners under section 21 of the Finance Act 1922 or section 245 of the Income Tax Act 1952 or any amendment thereto or re-enactment thereof

IN WITNESS, *etc.*

FORM 25

Assignment of Debt at Less than its Face Value

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN AB of *etc.* (hereinafter called "the Vendor") of the one part and CD of *etc.* (hereinafter called "the Purchaser") of the other part

WHEREAS:—

(1) On the —— day of —— 19— XY LIMITED (hereinafter called "the Company") became indebted to the Vendor in the principal sum of £—— repayable on demand [with interest thereon until repayment at the rate of £—— per cent. per annum]

(2) The said principal sum of £—— remains due and owing to the Vendor [but interest thereon at the rate aforesaid has been paid up to the —— day of —— 19—]

(3) It is apprehended by the Vendor that the Company is not at present able to repay the said principal sum or any substantial part thereof and that the Company will not be or become able to do so for a considerable time

(4) The Purchaser has recently become a shareholder and director of the Company

(5) The Vendor has agreed with the Purchaser for the absolute assignment to him of the said principal sum of £—— [and all interest becoming due thereon after the said —— day of —— 19—] for the sum of £——

Now in consideration of the sum of £—— now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) THIS DEED WITNESSETH as follows:—

1. The Vendor as beneficial owner hereby assigns unto the Purchaser ALL THAT the said principal sum of £—— [together with all interest becoming due thereon after the said —— day of —— 19—] and all rights remedies and powers in relation thereto TO HOLD the same unto the Purchaser absolutely

2. It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £——

In witness, *etc.*

FORM 26

Confirmation of Leases Granted by a Non-Owner

THIS DEED OF CONFIRMATION is made the —— day of —— 19— BETWEEN XY LIMITED whose registered office is situate at *etc.* (hereinafter called "the Company") of the one part and AB of *etc.* (hereinafter called "Mr AB") of the other part

WHEREAS:—

(1) The Company is registered at H.M. Land Registry as proprietor with an absolute title of the property described in the First Schedule hereto (hereinafter called "the property")

(2) Mr. AB is now and was at the respective dates of the Leases hereinafter mentioned a director of the Company

(3) By the several Leases particulars whereof are set forth in the Second Schedule hereto Mr. AB with the approbation (hereby testified) of the Company granted or purported to grant to the several tenants Leases of the flats comprised in the property for the term and at the rents respectively mentioned in the said schedule but all such Leases were made in the name of Mr. AB and not in the name of the Company

(4) The Company and Mr. AB are desirous that the said Leases shall be formally adopted by the Company and that the same shall take effect in all respects as if the same had originally been granted by or on behalf of the Company

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

1. Mr. AB hereby releases assigns and confirms unto the Company all rights title and interest (if any) now vested in him or to which he may be entitled under or by virtue of the said several Leases mentioned in the Second Schedule hereto

2. The Company hereby recognises and adopts the said Leases in all respects and for all purposes and grants and confirms unto the respective tenants entitled thereunder all such estates rights and interests but subject to such exceptions reservations and obligations as would have been respectively granted excepted and reserved or created if the said Leases had originally been

expressed to have been made by or on behalf of the Company and to the intent that such Tenants must claim hereunder as if they were parties hereto

In witness, *etc.*

The First Schedule above referred to
[Description of property]

The Second Schedule above referred to
[Particulars of flats]

FORM 27

Vesting Deed where land originally settled has been sold and further land is then bought with the capital money arising from the sale [1]

(*Drafted by John F. Eden, B.A., Solicitor*)

THIS VESTING DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the first part, B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the second part and D of *etc.* [tenant for life] (hereinafter called "the Purchaser") of the third part

WHEREAS:—

(1) X deceased late of *etc.* (hereinafter called "the Testator") by his Will dated the —— day of —— 19— appointed the Trustees to be the Executors and Trustees thereof and gave and devised and bequeathed to the Trustees certain property upon trust to pay the income thereof to the Purchaser for his life and after his death to hold the same upon trust for sale as therein mentioned

(2) The Testator died on the —— day of —— 19— without having revoked or altered his said Will which was on the —— day of —— 19— duly proved in the —— Probate Registry by the Trustees

(3) The Trustees have retained the proceeds of the sale of such property and by virtue of the provisions of the Settled Land Act, 1925, such proceeds of sale are or represent capital money within the meaning of the said Act and are held by the Trustees as the trustees for the purposes of the said Act

(4) The Vendor is the estate owner in respect of the fee simple in possession of the property hereby conveyed free from incumbrances and has agreed with the Purchaser for the sale thereof to him for the sum of £—— and the Purchaser has

[1] Stamp duty *ad valorem*. This precedent gives effect to the views expressed in articles in Vol. 213 of the *Law Times*. See *Emmet on Title* (14th ed.), Vol. II, p. 26.

directed the Trustees to pay the said sum out of capital money in their hands as such Trustees as aforesaid.

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £—— now paid by the Trustees to the Vendor by the direction of the Purchaser (the receipt of which sum the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby conveys unto the Purchaser ALL *etc.* [Parcels] TO HOLD the same unto the Purchaser in fee simple

2. The Purchaser shall stand possessed of the premises upon the trusts and with and subject to the powers and provisions upon and subject to which under the recited Will or otherwise the same ought to be held from time to time

3. The Trustees are the trustees of the Settlement for the purposes of the Settled Land Act, 1925.

4. [*Additional or larger powers*]

5. [*Power to appoint a new trustee*]

6. [*Certificate as to value*]

IN WITNESS, *etc.*

FORM 28

Special Conditions on a Sale by Tender[1]

Particulars of the Property

Special Conditions of Sale

1. The Conditions of Sale known as the National Conditions of Sale Seventeenth Edition shall apply hereto so far as the same are not inconsistent with the Special Conditions hereinafter contained and are applicable to a sale by private treaty

2. The Vendors are Messrs. AB of *etc.* and the Vendors' Solicitors are Messrs. CD of *etc.*

3. The Purchaser shall be such person persons or corporation whose offer to purchase the property shall be accepted by or on behalf of the Vendors in the manner hereinafter provided for

4. Within —— days from the date when the contract embodying these Conditions shall first come into effect (hereinafter called "the effective date") the Purchaser shall pay to the Vendors' Solicitors a deposit of 10 per cent. of the purchase price to be held by them as stakeholders and for the purpose of this Condition time shall be of the essence hereof

5. Completion shall take place at the offices of the Vendors' Solicitors or at such other place as the Vendors may require on the first working day after the expiration of —— weeks from the effective date and for the purposes of this clause time shall be of the essence hereof

6. The Vendors are selling and will convey the property as beneficial owners

7. The title shall commence *etc.*

[1] It is assumed in this form that the property has been advertised and that a suitable covering letter will accompany the particulars and conditions.

8. The property is sold on the footing that the permitted use thereof for the purposes of the Town and Country Planning Acts, 1947–1959, is use for the purposes of —— but is sold subject to the provisions of the Development Plan of the Local Planning Authority and to all or any planning schemes designations and proposals whether contained or referred to therein or otherwise and the Purchaser shall not make any requisition or enquiry of the Vendors or be entitled to be supplied with any evidence as to any of the above matters

9. The property is sold subject to [covenants *etc.*]. Copies of the said [covenants *etc.*] may be inspected by appointment at the offices of the Vendors' Solicitors and the Purchaser shall be deemed to purchase with full knowledge of the contents and effect thereof and shall not make any requisition or raise any objection in respect thereof

10. If the Purchaser shall fail to observe or comply with any of the obligations imposed upon the Purchaser by the Conditions herein contained or incorporated and such failure shall not have been occasioned by any default on the part of the Vendors then the Vendors may at any time thereafter (but without prejudice to any other remedies) by notice in writing specifying such failure or non-compliance served upon the Purchaser's Solicitor rescind the Contract and thereupon the Vendors shall be and become absolutely entitled to any deposit paid by the Purchaser hereunder and to give a good discharge therefor to any stakeholder and shall be at liberty to sell or otherwise dispose of the property as the Vendors shall think fit

Form of Offer to Purchase

To: Messrs. [*Vendors' Solicitors*]

A. I [We] —— of —— in the County of —— hereby make a firm offer to purchase the property described in the foregoing Particulars of Sale upon and subject to the foregoing Special Conditions of Sale at the price of £——

B. The offer herein contained is made on the understanding that it will be considered on or before the —— day of —— 19— and that unless it shall be accepted within the time and

in the manner hereinafter mentioned the said offer shall lapse and cease to have effect

C. It is understood and agreed that this offer may be accepted by or on behalf of [*the Vendors*] as the Vendors of the said property by a letter of acceptance in that behalf signed by or on behalf of the said Vendors addressed to [me] [us] [the company] at the above-mentioned address and sent by registered post on or before the —— day of —— 19— and that the said acceptance shall be complete and binding from the time when the letter containing the same shall have been received into the custody of the Post Office and the provisions of Special Conditions 3 and 4 hereof shall have effect accordingly

D. It is further understood and agreed that the said Vendors shall be under no obligation to accept this or any other offer which may be made

AS WITNESS my [our] hand[s] this —— day of —— 19—

FORM 29

Reservation of Right to enlarge a block of flats contained in the leases of flats [1]

[Excepting and Reserving unto the Landlords absolutely:] the right at any time during a period ending on the expiration of 21 years from the death of the survivor of the descendants now living of His late Majesty King George the Sixth for the Landlords to enlarge the building of which the Flat forms a part by adding an additional storey or storeys thereto for the purpose of providing a further flat or flats notwithstanding any interference or inconvenience thereby occasioned to the Lessee or the occupiers for the time being of the Flat or any temporary derogation from any of the terms of this Lease Provided always that in regard to the exercise of this right the following provisions shall have effect:—

(1) The said works shall be such only as in the opinion of the architects or surveyors appointed by the Landlords to advise in that behalf may reasonably and consistently with good design be constructed on the existing building

(2) Before commencing any works in connection with such enlargement the Landlords shall give to the Lessee not less than 14 clear days' notice of their intention so to do

(3) The said works shall be undertaken and completed in such a manner as to cause the least amount of interference and inconvenience to the Lessee and to the occupiers of the Flat consistently with the execution of the said works in a reasonable and practical way

(4) The Landlords shall make good all physical damage done to or suffered by the Flat or any chattels therein in the execution of any of the said works

[1] This is the main provision. It would also be necessary to make suitable references to such possible extensions in the general reservations dealing with such matters as rights of support and protection and rights in respect of services.

FORM 30

Clause providing for service of notices by recorded delivery post

(*Drafted by Sidney Leigh, Solicitor*)

Any notice hereunder shall be in writing and shall be sufficiently served if it is sent through the post by recorded delivery addressed to the person on whom it is to be served at his last known place of abode or business in the United Kingdom or by any mode of service authorised under section 196 of the Law of Property Act, 1925

FORM 31

Agreement between directors of a company for the mutual protection of their own and their widows' interests

(*Drafted by Peter Elman, Barrister-at-Law*)

THIS AGREEMENT is made the —— day of —— 19— BETWEEN AB of *etc.*, Company Director (hereinafter called "Mr. AB") of the first part CD of *etc.*, Company Director (hereinafter called "Mr. CD") of the second part B of *etc.* aforesaid, the wife of Mr. AB (hereinafter called "Mrs. AB") of the third part and C of *etc.* aforesaid, the wife of Mr. CD (hereinafter called "Mrs. CD") of the fourth part

WHEREAS:—

1. The parties hereto are between them the only members of —— Limited (hereinafter called "the Company") a private company incorporated under the Companies Act, 1948, holding in his or her own right and interest all the issued shares thereof in manner following:—

Mr. AB	2,000	Ordinary	shares	of	£1	each
,, CD	2,000	,,	,,	,,	,,	,,
Mrs. AB	1,000	,,	,,	,,	,,	,,
,, CD	1,000	,,	,,	,,	,,	,,

2. Mr. AB and Mr. CD are also the present directors of the Company

3. For the purpose of ensuring the proper and continued control and conduct of the business of the Company and their mutual benefit and protection the parties hereto have agreed to enter into this Agreement and the mutual obligations and undertakings herein contained

NOW THIS AGREEMENT made in pursuance of the premises WITNESSETH as follows:—

1. Mr. AB and Mr. CD shall forthwith procure the due appointment of Mrs. AB and Mrs. CD and Mrs. AB and Mrs. CD shall serve as directors of the Company

2. Each of the parties hereto hereby undertake with each of the others and the others of them as follows:—

(1) None of them respectively shall without the consent in writing of the person or persons affected do or omit to do or suffer to be done any act matter or thing whereby or by reason whereof any other or others of them shall be precluded from attaining his or her or their office as a director or directors of the Company and without prejudice to the generality of the foregoing each of them shall oppose and vote against any proposal draft or other resolution having as its object the removal from office as aforesaid of any other or others of them

(2) Each of them respectively shall do and concur in doing and shall not howsoever object to or oppose all acts matters and things necessary for the purpose of voting and paying as and by way of the fees and remuneration of the directors of the Company such an aggregate amount in each financial year as shall be not less than the aggregate amount in respect thereof hitherto paid to and received by the directors of the Company after making such financial provisions for depreciation directors expenses tax and otherwise as have hitherto been made in the accounts of the Company so far as the business of the Company shall permit the same to be done and in the event of dispute as to the aggregate amount which shall so be voted and paid such an aggregate amount as the auditors for the time being of the Company shall in writing advise within 28 days after the close of the financial year of the Company bearing in mind the proportion of the net profits of the Company so voted and paid in previous years such advice to be conclusive and binding upon the parties hereto

(3) The aggregate amount ascertained as aforesaid shall in each year be divided among and paid to the parties hereto in such proportions as they shall agree and in default of agreement in the proportions following:—

Mr. AB $\frac{3}{8}$
Mr. CD $\frac{3}{8}$
Mrs. AB $\frac{1}{8}$
Mrs. CD $\frac{1}{8}$

Provided that (a) (i) if Mr. AB shall die or otherwise cease

to be a director of the Company the proportion of Mrs. AB shall as from the date thereof be increased to $\frac{1}{4}$ (ii) if Mr. CD shall die or otherwise cease to be a director of the Company the proportion of Mrs. CD shall as from the date thereof be increased to $\frac{1}{4}$ (iii) if Mrs. AB shall die or cease to be a director of the Company the proportion of Mr. AB shall as from the date thereof be increased to $\frac{1}{2}$ and (iv) if Mrs. CD shall die or otherwise cease to be a director of the Company the proportion of Mr. CD shall as from the date thereof be increased to $\frac{1}{2}$ and

(b) pending the ascertainment of the said aggregate amount the parties hereto shall together be entitled to draw on account thereof in each financial year an amount equal to one half the aggregate amount paid in the previous financial year and as between them in the proportions aforesaid

(4) Notwithstanding anything from time to time otherwise contained or incorporated in the Memorandum or Articles of Association of the Company or implied under the general law and subject as hereinafter provided none of the parties hereto shall receive or be entitled to receive any sum of money or other consideration of any kind from the Company in respect of his or her services as a director thereof other than the remuneration hereinbefore provided Provided that each of them shall be entitled to be repaid and shall be repaid all such expenses as are properly incurred by him or her in connection with the business of the Company and in the opinion of the said auditors chargeable and are in fact allowed for the purpose of calculating the tax liability of the Company in respect of the profits thereof

3. It is hereby agreed and declared that during the subsistence of this Agreement the office of chairman of the Company and its board of directors shall be held in rotation from meeting to meeting by the parties hereto the first chairman to be Mr. AB

4. This Agreement is conditional upon each of the parties hereto retaining in his or her own right and interest his or her respective shareholding in the Company hereinbefore recited and shall continue as long as three of them shall continue to be directors of the Company

IN WITNESS, *etc.*

FORM 32

Agreement for the introduction of a new Director of a Company providing finance with provisions for the mutual protection of the new and continuing directors

(*Drafted by Peter Elman, Barrister-at-Law*)

THIS AGREEMENT is made the —— day of —— 19— BETWEEN AB of *etc.*, Company Director (hereinafter called "AB") of the first part CD of *etc.*, Company Director (hereinafter called "CD") of the second part —— Limited whose registered office is situate at *etc.* (hereinafter called "the Company") of the third part and EF of *etc.* (hereinafter called "EF") of the fourth part

WHEREAS:—

1. The Company was incorporated on the —— day of —— 19— as an exempt private company limited by shares with an issued share capital of £100 divided into 100 shares of £1 each

2. The said issued share capital of the Company is now held as to 51 shares numbered —— to —— by AB as to 25 shares numbered —— to —— by CD and as to 24 shares numbered —— to —— by GH and AB and CD and the said GH are the present directors of the Company

3. The parties hereto have agreed that EF shall participate in the financing management and control of the Company upon the terms and subject to the conditions hereinafter contained

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED AND DECLARED as follows:—

1. AB and CD shall sell or procure the sale to EF at par of 25 shares in the issued share capital of the Company free from any charge lien incumbrance or right of claim of any person Provided that 24 of such shares shall be those now held by the said GH

2. Concurrently with such sale and purchase as aforesaid AB and CD shall procure the said GH to resign without any

claim against the Company for damages compensation or otherwise his office as a director of the Company and to cancel and determine all service or other agreements subsisting between the said GH and the Company

3. Forthwith upon such sale and purchase as aforesaid AB and CD shall procure the Company to and the Company shall duly

(a) register EF as a member of the Company

(b) appoint EF as a director of the Company

(c) appoint EF as Chairman and subject as hereinafter set out Joint Managing Director of the Company

(d) alter the Articles of Association of the Company in the manner hereinafter set out

4.—(a) So soon as all the matters hereinbefore set out shall have been duly completed EF shall enter into a personal guarantee with —— Bank Limited —— Branch in the form usually required by such bank in respect of the Company's overdraft therewith up to a maximum limit at any one time of £——

(b) In respect and in consideration of the guarantee so entered into by EF and so long as the same shall be subsisting the Company hereby undertakes with EF to reduce its present overdraft with the said —— Bank Limited —— Branch at the times and by the amounts following namely

(i) From the 1st day of January 19— to the 30th day of June 19— by weekly instalments of £——

(ii) From and after the 1st day of July 19— by weekly instalments of £——

(c) In further consideration as aforesaid AB hereby undertakes with EF

(i) so long as the said guarantee shall be subsisting not to withdraw any guarantee at present or hereafter to be entered into by AB with any bank in respect of the Company's overdraft therewith or any other moneys owing by or obligations and liabilities of the Company

(ii) so long as the said guarantee shall be subsisting not to demand repayment of any sums at present or hereafter to be standing to the credit of any loan account of AB's with the Company until all overdrafts of the Company

with any bank are satisfied and discharged but so that the Company shall not become liable to any other person firm or company or its liability in relation to any other person firm or company be increased by reason of any such repayment whether by the amount thereof or any other amount

(iii) to pay to EF forthwith upon demand one equal half part of any sum or sums that EF may at any time or times be required to pay and shall pay under or by virtue of the said guarantee entered into by EF

5. In respect of the said appointment of EF as Joint Managing Director of the Company the following provisions shall apply

(a) EF shall act jointly with AB as Managing Director of the Company and in this capacity shall devote such time and attention to the affairs of the Company as EF may in his discretion deem to be reasonably necessary for the proper conduct of the Company's affairs Provided that nothing in this clause contained shall relieve AB from his obligation to devote his whole time and attention exclusively to the Company's affairs

(b) EF shall receive as remuneration a sum at the rate of £—— per annum payable by equal monthly instalments on the —— day of each month such remuneration to be in addition to any other fees or remuneration that EF may receive or be entitled to receive as Chairman or director of the Company or otherwise

6. In pursuance of clause 3 (d) of this Agreement the Articles of Association of the Company shall be altered as follows:—

After Article —— of the existing Articles of Association of the Company there shall be inserted the following new Articles

"A. All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments, and all receipts for moneys paid to the Company, shall be signed, drawn, accepted, endorsed, or otherwise executed, as the case may be, by not less than two directors of whom one shall always be the holder of shares numbered —— to —— inclusive and if there be more than one the first named of such holders in the books of the Company

"B. Clause 98 of Part I of Table A shall be read and construed as if the words 'In case of an equality of votes the chairman shall have a second or casting vote' were omitted therefrom

"C. Clause 104 of Part I of Table A shall be read and construed as if the words 'and in the case of an equality of votes the chairman shall have a second or casting vote' were omitted therefrom

"D. No resolution of the Company in General Meeting or of the Board of Directors shall be valid and effectual unless consented to by the holder of the said shares numbered —— to —— inclusive signified by his or her signing the same

"E. The holder of the said shares numbered —— to —— and the holder of the shares numbered —— to —— and in each case if there be more than one the first named of such holders in the books of the Company shall each be entitled to be a director and managing director of the Company"

7. AB and CD hereby jointly and severally undertake with EF that they and he shall so use their and his voting powers and do all such other acts and things as may be necessary in the circumstances to procure that the Company shall not alter modify or vary the Articles of Association of the Company as hereinbefore altered without the previous consent in writing of the holder of the said shares numbered —— to —— inclusive

8. AB and CD hereby further jointly and severally undertake with EF that in the event of the death of EF during the subsistence of this Agreement AB and CD and each of them shall procure the Company and the Company hereby undertakes with EF to register the widow of EF him surviving as a member of the Company in respect of the said shares numbered —— to —— inclusive together with all the rights and privileges attaching to such shares as hereinbefore set out or provided for Provided nevertheless that the remuneration of such widow as Joint Managing Director of the Company shall be at the same rate as that of the deceased at the date of his death for a period

of three years from such date and thereafter at half of such rate

9. EF hereby undertakes with AB that in the event of the death of AB during the subsistence of this Agreement EF shall procure the Company to appoint the widow of AB him surviving as a member of the Company in respect of the said shares numbered —— to —— inclusive together with all the rights and privileges attaching to such shares as hereinbefore set out or provided for Provided nevertheless that the remuneration of such widow as Joint Managing Director of the Company shall be at the same rate as that of the deceased at the date of his death for a period of three years from such date and thereafter at half of such rate

10. Notwithstanding anything hereinbefore contained if at any time either AB or EF shall be desirous of resigning as a member of the Company or shall die then the one so desirous or his personal representatives shall have the right to require the other of them by 28 days' notice in writing to purchase the shares of the one so desirous or of the deceased as the case may be at a fair valuation thereof such fair valuation to be determined and certified by the auditors for the time being of the Company and when so determined and certified to be conclusive and binding and before or upon the expiration of such notice the other of them shall purchase and pay for such shares at such fair valuation and thereupon this Agreement shall cease and determine

11. Completion of the matters set out in clauses 1 2 and 3 hereof shall take place on or before the —— day of —— 19— at the offices of —— at —— in the County of —— at such hour of the day as the said —— shall notify to the parties hereto

12. Until such completion as aforesaid AB and CD and the Company hereby jointly and severally undertake with EF that the Company shall not without the previous consent in writing

(a) transfer allot issue or grant any right to any person to call for the transfer allotment or issue of any part of the capital of the Company or otherwise change its capital structure

(b) enter into any contract or incur any liability other than in the ordinary course of business or to mortgage charge sell dispose of or otherwise deal with any of the property assets or effects of the Company

(c) alter add to or otherwise modify the Memorandum or Articles of Association of the Company

(d) do any act or thing whereby or by virtue whereof the business and the goodwill of the Company may be howsoever prejudiced but to carry on the business of the Company to their his or its best capacity and in consultation with EF

13. The parties hereto hereby undertake one with the other to do or concur in doing all such acts matters and things and to execute and concur in executing all such deeds and documents as may be necessary to carry into effect the terms of this Agreement and each of them

14. Subject as hereinbefore contained this Agreement shall subsist as long as the Company or any other company succeeding to or taking over the property and assets or business of the Company shall continue to exist

IN WITNESS, *etc.*

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